TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 33.

THE ALASKA TREADWELL GOLD MINING COMPANY, PLAINTIFF IN ERROR,

vs.

PATRICK WHELAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JANUARY 17, 1895.

(15,774.)

(15,774.)

SUPREME COURT OF THE UNITED STATES.

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No. 215.

THE ALASKA TREADWELL GOLD MINING COMPANY, PLAINTIFF IN ERROR,

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 7, 1896.

1 United States Circuit Court of Appeals for the Ninth Circuit.

Transcript of Record.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN. } No. 161.

Appeal from the district court of the United States in and for the district of Alaska.

2-8 In the United States Circuit Court of Appeals, Ninth Circuit, October Term, 1893.

Transcript of Record from the District Court of the United States in and for the District of Alaska.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN. } No. 161.

9 THE UNITED STATES OF AMERICA, *District of Alaska,* } ss:

Pleas and proceedings began and had in the district court of the United States for the district of Alaska, at and prior to the adjourned May term, 1893, thereof, begun and held at Juneau, in said district.

Present: The Honorable Warren Truitt, judge.
In the case of—

PATRICK WHELAN, Plaintiff,
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY, Defendant. } No. 319.

Be it remembered that on the 22nd day of January, A. D. 1892, the plaintiff, by John F. Maloney, Esq., his attorney, filed in said court his complaint in said cause, which is in words and figures following to wit:

In the United States District Court in and for the District of Alaska.

PATRICK WHELAN, Plaintiff,
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY, Defendant. }

For complaint in the above-entitled action, the plaintiff complains and alleges—

10 That the defendant is a corporation organized under the laws of the State of California and doing business and hav-

ing its mines and carrying on its works on Douglas island in the district of Alaska.

That on the 23rd day of November, 1891, and for nearly six months prior thereto, this plaintiff was in the employ of said defendant as a workman in the mine of said defendant in breaking and preparing rock for the chutes and doing other work as ordered by the foreman of said defendant, one Samuel Finley, under whom this plaintiff worked, and from whom he received his orders. That on the 23rd day of November, 1891, while this plaintiff was yet in the employ of said defendant, he was ordered by the foreman of said defendant company to break rock immediately above and over one of the chutes of the defendant company. That in compliance with the orders of the foreman of said defendant, and as became his duty so to do, the plaintiff proceeded to his place immediately above and over said chute and commenced to break said rock as he had been ordered so to do, and that while so engaged and carefully and skilfully and without negligence performing his duties as aforesaid, *and* without the knowledge of this plaintiff, and carelessly and negligently the foreman of said defendant drew or caused to be drawn the gate at the mouth of said chute over which this plaintiff was working, thereby causing the rock at the head of said chute to be suddenly drawn in, carrying this plaintiff with it, through said chute, a distance about thirty feet and completely covering him with great quantities of rock and debris, thereby rendering him wholly unconscious and badly cutting and bruising his eye,
11 cutting a hole in his jaw, and knocking out one of his teeth, badly cutting and injuring his wrist so that he will forever be deprived of the free use of it, and greatly injuring and bruising his shoulder.

That by reason of the injuries so sustained, the face and head of this plaintiff was and is greatly disfigured and his body grievously wounded and greatly shattered, so that he suffered great pain of body and mental anguish, and from the said 23rd day of November, 1891, to the commencement of this action the plaintiff has been continually sick and suffering great pain, and is unable to do or to perform any labor, and by reason of said injuries so carelessly and negligently done this plaintiff he will forever be greatly disfigured, and that his head, body and limbs have been so shattered and bruised by reason of being drawn through said chute as to render him incapable of ever performing manual labor or labor requiring physical exertion, so that he will be deprived of his heretofore means of support. That prior to the time of receiving said injuries this plaintiff was in good health and of great physical strength and was earning by his labor the sum of sixty dollars and board per month *and board*, but now his health is entirely destroyed and he has been rendered by said injuries a complete physical wreck, forever disfiguring, maiming and injuring this plaintiff to his damage in the sum of twenty thousand dollars.

Wherefore plaintiff demands judgment against said defendant in the sum of twenty thousand dollars and costs of action.

J. F. MALONEY,
Att'y for Plaintiff.

12 UNITED STATES, }
District of Alaska, } ss:

Patrick Whelan, being duly sworn, says that he is the plaintiff in the above-entitled action, and that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true, as he verily believes.

PATRICK WHELAN.

Subscribed and sworn to, before me, this 13th day of January, 1892.

[SEAL.]

W. R. HOYT,
U. S. Commissioner for Alaska.

(Endorsed:) No. 319. In the U. S. dist. court for Alaska. Patrick Whelan, pl'ff, *vs.* The Alaska Treadwell Gold Mining Company, def't. Complaint. Filed January 22, 1892. N. R. Peckinpaugh, clerk. J. F. Maloney, att'y for pl'ff.

And thereupon, on said 22nd day of January, 1892, a summons was duly issued out of the clerk's office of said court, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

PATRICK WHELAN, Plaintiff,
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY, Defendant.

No. 319. Summons. Action for Damages.

13 The President of the United States of America to The Alaska Treadwell Gold Mining Company, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Juneau in said district, and answer the complaint filed against you in the above-entitled action, within 20 days from date of service of this summons upon you; and, if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of twenty thousand dollars and costs of action.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness, the Honorable John S. Bugbee, judge of said district court, and the seal of said court, affixed at Sitka, in said district, this 22d day of January, 1892.

[SEAL.]

N. R. PECKINPAUGH, *Clerk.*

J. F. MALONEY,
Attorney for Plaintiff.

(Endorsed:) No. 319. In the district court of the United States for the district of Alaska. Patrick Whelan, plaintiff, *vs.* The Alaska Treadwell Gold Mining Company. Summons. Returned and filed Feb. 6, 1892. N. R. Peckinpaugh, clerk.

(*Marshal's Return.*)

UNITED STATES, *District of Alaska,* } ss:

I hereby certify that the within summons came into my hands for service on the 23rd day of January, 1892.

And I served the same on the within-named defendant,
14 at Douglas island, Alaska, on the 25th day of January, 1892, by delivering to and leaving with Robert Duncan, agent of the within-named corporation, a copy hereof, together with a copy of the complaint.

ORVILLE T. PORTER,
U. S. Marshal,
By MAX ENDLEMAN,
Deputy U. S. Marshal.

And afterwards, to wit, on the 6th day of February, 1892, the defendant, by Delaney & Gamel, its attorneys, filed in said court in said cause, its answer, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

PATRICK WHELAN, Plaintiff,
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY, Defendant.

Comes now the defendant, and for answer to the plaintiff's complaint herein, respectfully shows to the court:

1. The defendant admits that it is a corporation organized under the laws of the State of Minnesota, and doing business and having its mines and carrying on its works on Douglas island in the district of Alaska; and that on the 23rd day of November, 1891, the plaintiff was, and for several months prior thereto had
15 been, in the employ of the defendant as a workman in its said mines, engaged in breaking and preparing rock for the chutes in the pit of said mines.

2. The defendant specifically denies that on the 23rd day of November, 1891, the plaintiff was ordered by the defendant or its foreman to break rock immediately above and over one of said chutes, and also denies that in compliance with any such order the plaintiff proceeded to his place immediately above and over said chute and commenced to break rock, and also denies that while plaintiff was so engaged carefully and skilfully the defendant by its foreman or anybody else drew or caused to be drawn the gate at

the mouth of said chute whereby plaintiff was suddenly drawn into and carried through the same; the defendant also denies that the plaintiff was seriously injured and that he will be deprived of the free use of his wrist and was and is greatly disfigured in body and grievously wounded and greatly shattered, also denies that he suffered great pain and bodily and mental anguish from November 23rd, 1891, to the commencement of this action, also denies that he has been continuously sick and unable to perform any labor by reason of any injuries carelessly or negligently done by the defendant, also denies that the plaintiff will be forever greatly disfigured and that his head, body and limbs have been so shattered and bruised as to render him incapable of performing manual labor or labor requiring physical exertion, so that he will be deprived of his heretofore means of support; the defendant also denies that the plaintiff's health is entirely destroyed, also denies that he has been rendered a complete physical wreck, forever disfigured,
16 maimed and injured to his damage in the sum of twenty thousand dollars or any sum whatever.

3. For other and further answer to the plaintiff's complaint, the defendant shows that among other structures belonging to its aforesaid mines are certain underground tunnels extending into the quartz ledge where defendant is now engaged in mining, and that said tunnels are in several places connected with the bottom or floor of the large open pit in defendant's said mine by chutes or upraises from said tunnels to said pit; that at the lower end of each of said chutes or upraises there is placed a gate which upon being opened allows the broken rock in the chute to descend into the tunnel; that the rock so broken is conveyed by a locomotive and small railway cars into the mill of the defendant to be crushed; that such cars are loaded by backing the train under the chute and opening the gate whereby the rock descends into the cars; that one of the established rules of the defendant of long standing requires the person in charge of the train to notify the men breaking rock in the pit whenever the gate is to be opened; that the opening of said chutes or upraises are very conspicuous, and their location cannot be mistaken by any one giving the most casual care to his surroundings; that the plaintiff must have known when he was injured on the 23rd day of November, 1891, the location of the chute in which he received his alleged injuries; that immediately before the accident hereinafter described happened to the plaintiff the train entered the tunnel for the purpose of loading up, and before the gate was opened the plaintiff was notified thereof; and after such notice the employees of the company handling the train opened
17 the gate, and after drawing part of the rock from the chute to load the train closed the gate again and moved partly out of the tunnel with the train for the purpose of loading another car, and that thereafter the plaintiff and his colaborer in the pit proceeded with their work of breaking the rock; that after the rock had been drawn from said chute as aforesaid the entire contents of the chute did not pass down and out, but the upper portion thereof became lodged together at the top of the chute thus forming a shell

or bridge covering the opening of the chute; that the plaintiff well knowing the opening to said chute, and that rock has just *and* been drawn down therefrom, carelessly and negligently without any fault of this defendant whatever, went upon the shell or bridge of rock so lodged over the opening of said chute as aforesaid whereupon the same gave way and the *defendant* descended to the bottom of the chute where he was caught by the gate and buried by the falling rock; that immediately upon the alarm being given by a colaborer at work with him in the pit, the employees of the defendant opened the gate which offered the only means of extracting the plaintiff from his perilous position; that he was removed with the greatest possible care and escaped with comparatively slight injuries, for which this defendant was in no way whatever responsible, the accident having occurred entirely through the carelessness and negligence of the plaintiff himself. The defendant further alleges that the plaintiff has greatly exaggerated the injuries received by him by the accident, and that he has been for several weeks
18 past able to resume his place and perform the labor thereof as one of the rock-breakers in defendant's said pit, which place defendant has tendered to him and has been at all times ready and willing for him to have, but that the plaintiff is feigning great injuries as the result of said accident for the purpose and with the hope of recovering large damages against the defendant.

Wherefore the defendant demands judgment dismissing this action with costs.

DELANEY & GAMEL,
Attorneys for Defendant.

UNITED STATES OF AMERICA, }
District of Alaska, } *ss*:

Robert Duncan, Jr, being first duly sworn, deposes and says: I am the superintendent of the company, defendant in the above-entitled action, and have general supervision of its business, mill and mines at Douglas island, Alaska, and make this verification in behalf of said company for the reason that the president, vice-president, secretary or treasurer is not now within the district of Alaska; that I have read the foregoing answer and the same is true as I verily believe.

ROBT DUNCAN, JR.

Subscribed and sworn to before me this first day of February, A. D. 1892.

W. R. HOYT,
[SEAL.] *U. S. Commissioner in and for Alaska.*

(Endorsed:) No. 319. U. S. district court for the district
19 of Alaska. Patrick Whelan, plaintiff, *vs.* The Alaska Treadwell Gold Mining Co., defendant. Answer. Service of the within answer is hereby admitted this 2d day of February, A. D. 1892. J. F. Maloney, attorney for pl'ff. Delaney & Gamel, attorneys for def't. Filed Feb. 6, 1892. N. R. Peckinpaugh, clerk.

And afterwards, to wit, on the 10th day of May, 1892, the plaintiff, by his attorney, filed in said court in said cause, his reply, which is in words and figures following, to wit:

In the United States District Court for Alaska.

PATRICK WHELAN, Plaintiff,
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY, Defendant.

For answer to the new matter set forth in the defendant's answer the plaintiff replying says:

That he denies that it is an established rule of the defendant requiring the person in charge of the train to notify the men breaking rock in the pit when the gate is to be opened.

Denies that the openings of said chutes are conspicuous, and that their location cannot be mistaken by one giving casual care to his surroundings.

Denies that he knew the location of the chute on the 23d day of November when he was injured, also denies that before the gate was opened this plaintiff was notified.

Denies that the rock lodged together at the top of the chute thus forming a shell and that the plaintiff knew the opening to said chutes, and that he carelessly and negligently went over and upon the rock at the mouth of said chute.

Plaintiff denies that he has exaggerated the injuries he has received and that he is able to resume his place or to perform labor of any such nature.

Wherefore plaintiff prays the relief demanded in his complaint.

PAT. WHELAN.

UNITED STATES, } *ss:*
District of Alaska, }

Patrick Whelan, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing reply and knows the contents thereof, and that the same is true, as he verily believes.

Subscribed and sworn to before me this 9th day of May, 1892.

J. F. MALONEY,
Notary Public.

(Endorsed:) No. 319. In the U. S. dist. court for Alaska. Patrick Whelan, pl'ff, *vs.* The Alaska Treadwell Gold Mining Co. Reply. Filed May 10, 1892. N. R. Peckinpaugh, clerk. ——, pl'ff's att'y.

And afterwards, to wit, on the 16th day of June, 1893, the following among other proceedings were had, and appear of record in said cause, to wit:

21 *Trial of Cause.*

PATRICK WHELAN
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY } No. 319.

This cause coming on for trial, the plaintiff being represented by Messrs. J. F. Maloney and C. S. Blacket, and the defendant by Messrs. A. K. Delaney, John S. Bugbee and J. G. Heid, the venire was called by the clerk, and the jurors having been sworn as to their qualifications, and examined and accepted, the following were sworn to try the issues: Frank Young, Allen Noyes, Jay Decker, Maglorius Le Page, W. M. Stanton, Oliver H. Adset, Anisum Starchoff, James Patton, George H. Mason, Henry Korkorin, Andrew P. Kashevaroff and W. E. Hunt.

The evidence being heard, the cause being argued by counsel, the jury was charged by the court, and retired for deliberation, in charge of a sworn officer.

Comes again the parties, the jury having returned into —, being called by the clerk, and answering to their names in the presence of counsel for plaintiff and defendant, and render the following verdict:

We, the jury in the above-entitled cause, duly empanelled and sworn, find for the plaintiff, and assess his damage at $2,950.00, two thousand nine hundred and fifty dollars.

ANDREW P. KASHEVAROFF, *Foreman.*

22 And afterwards, to wit, on the 17th day of June, 1893, the following further proceedings were had and appear of record in said cause, to wit:

Order of Court on Filing Notice of Motion for New Trial.

PATRICK WHELAN
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY. } No. 319.

Comes now the parties by their attorneys, and the defendant files its notice of motion and reasons for a new trial.

Which notice for motion and reasons for new trial is in words and figures following, to wit:

Notice of Motion and Reasons for New Trial.

In the United States District Court, District of Alaska.

PATRICK WHELAN, Plaintiff,
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY, Defendant. }

To the plaintiff and John F. Maloney, Esq., his counsel:

Take notice, that at the opening of the court, at two o'clock
23 in the afternoon of this day, or as soon thereafter as counsel

can be heard, at the court-room of the court in Juneau, defendant will move that the verdict rendered herein be set aside, and a new trial granted for the following causes, materially affecting the substantial rights of the defendant:

1st. Excessive damages appearing to have been given under the influence of passion or prejudice.

2nd. Insufficiency of the evidence to justify the verdict.

3rd. Errors in law occurring at the trial and accepted to by the defendant.

Said motion will be based upon the pleadings, papers and records herein and upon a bill of exceptions to be hereafter prepared and filed.

Dated Juneau, June 17th, 1893.

A. K. DELANEY,
JOHN S. BUGBEE,
JOHN G. HEID,
Attorneys for Defendant.

(Endorsed:) U. S. dist. court, dist. of Alaska. Patrick Whelan *vs.* Alaska Treadwell Gold Mng. Co. No. —. Motion for new trial. Service admitted, Juneau, June 17, 1893. J. F. Maloney. Filed June 17, 1893. N. R. Peckinpaugh, clerk.

And afterwards, to wit: on the 24th day of June, 1893, the following further proceedings were had and appear of record in said cause, to wit:

24 *Order of Court Overruling Defendant's Motion for a New Trial.*

PATRICK WHELAN
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY. } No. 319.

Comes now the parties by their attorneys and submits to the court defendant's motion for a new trial, and the court having heard the argument of counsel and being sufficiently advised overrules said motion, to which ruling of the court the defendant at the time excepted.

And afterwards, to wit: on the 11th day of July, 1893, the following further proceedings were had and appear of record in said cause, to wit:

Judgment for the Plaintiff.

PATRICK WHELAN
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY. } No. 319.

This action came on regularly for trial. The said parties appearing by their attorneys, J. F. Maloney and C. S. Blacket, for plaintiff, A. K. Delaney, John S. Bugbee, and J. G. Heid for defend-

ant. A jury of twelve persons was regularly impanelled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the argument of counsel and instructions of the court, the jury retired to consider their verdict, and subsequently returned into court with the verdict signed by the foreman, and being called
25 answer to their names and say: We, the jury in the above-entitled cause, duly impanelled and sworn, find for the plaintiff and assess his damages at two thousand nine hundred and fifty dollars.

Whereupon, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of two thousand nine hundred and fifty dollars, with interest thereon at the rate of 8 per cent. per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $76.55.

Judgment recorded the 11 day of July, 1893.

WARREN TRUITT,
U. S. Dist. Judge.

And afterwards, to wit: on the 8th day of September, 1893, the defendant filed its statement and bill of exceptions on motion for a new trial in said cause in words and figures following, to wit:

Defendant's Statement and Bill of Exceptions.

In the United States District Court, District of Alaska.

PATRICK WHELAN
vs.
ALASKA TREADWELL GOLD MINING COMPANY.

Defendant's bill of exceptions on motion for a new trial.

Be it remembered that the above-entitled cause came on for trial by the court and jury on the 16th day of June, 1893, at
26 Juneau in said district, John F. Maloney appearing for plaintiff and Messrs. A. K. Delaney, John S. Bugbee and John G. Heid appearing for the defendant.

Plaintiff to maintain the issues on his part offered the following testimony:

PATRICK WHELAN, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. MALONEY:

Q. What is your name, sir?
A. Patrick Whelan.
Q. What is your age Mr. Whelan?
A. Forty-six.
Q. Forty-six?

A. Yes, sir.
Q. Where were you on or about the 23rd of November, 1891?
A. Working for the Treadwell Company.
Q. How long had you been working there, Mr. Whelan?
A. About six months and a half.
Q. Six months and a half prior to that time?
A. Yes, sir.
Q. In what capacity were you working there?
A. Breaking rock and getting it ready to go through the chutes.
Q. Were you working there on the 23rd of November, 1891?
A. On the night.
Q. State what you were doing there at that time.
A. I was breaking rock on the ground and shoveling it into chute number 15 when Sam. Finley sent me up on top of this chute.
27 Q. Who was Sam. Finley?
A. The boss.
Q. The boss where?
A. Boss in the pit.
Q. From whom did you take your orders there?
A. Sam. Finley.
Q. Was he the man that ordered you up there?
A. Yes, sir.
Q. About what time was it he ordered you up there?
A. About 9 o'clock.
Q. Did you go up there?
A. Yes, sir.
Q. Proceed and tell the jury what you did when you got up there?
A. He told me to go on this chute and break rock on top of the chute and get it ready to draw, and I went up and worked, and he never came back to tell me to get off he was going to draw.
Q. Who was up there on the chute with you, Whelan?
A. Archie McCormick.
Q. Explain to the jury as well as you can what this chute is, how it was situated and how this rock covered it.
A. Well, this chute is next to the bench; they were working Burleighs on the bench, and he sent me up on top of this chute to break the rock and pound it fine enough to go through the chute.
Q. What is the chute, a hole going down; what do you mean by chute?
A. It is a pit going down into the tunnel; they pile the rock there and shoot it through into the cars to take away to the mill.
28 Q. Explain how the chute is constructed, and what there is at the bottom to prevent the rock going through into the cars.
A. There is a gate that is always closed until they get orders to draw; they fill the pit up, and when they get orders to draw they open the gate, and it goes into the cars.
Q. Who had charged of these cars running down there?

A. Charley, I forget his last name.

Q. Who were you under?

A. Under Sam. Finley.

Q. What was the custom there with Sam. Finley about giving you boys warning?

A. He always came up on top of the chute to see if we had got the rock broke fine enough, and if it was all right he told us to come down he was going to draw.

Q. State at what time you went up there, or about what time.

A. About 9 o'clock.

Q. Now state what condition the chute was in with reference to being covered with rock; that is the amount of rock upon it and so on.

A. I should think there was over thirty feet of rock, between 30 and 40 feet of rock.

Q. Covered to that depth?

A. Yes, sir, that amount of rock came down from the ledge, this chute was next to the bench and they were working on the bench and they would throw the rock over the chute.

29 Q. State to the jury, if while covered with that rock, you could tell where the opening or mouth of the chute was.

A. No, sir, I could not; I knew within three or four yards of it. I couldn't tell where it was. I couldn't come any closer than two or three yards.

Q. State whether on that evening, after he sent you to work there, he came back again that evening to notify you.

A. I never seen — again that evening—he never came back.

Q. State if that place where you were was a noisy place around there?

A. Well, there was two or three Burleighs working on the ledge that made considerable noise.

Q. How long had you been working there, Whelan, when the accident occurred?

A. About two hours and a half.

Q. You think about two hours and a half?

A. Yes, sir.

Q. During that time Mr. Finley did not come there to notify you?

A. No, sir.

Q. Now then, tell the jury, Mr. Whelan, as nearly as you can, how the accident occurred there.

A. Well, I was breaking rock on the chute. We had the rock most all broken, and I was breaking rock at the time.

Q. Go right ahead and tell us what you were doing at the time.

A. I was on top of the chute breaking this rock to get it
30 ready for drawing, and before he gave orders to draw he always came up to see if the rock was broken fine enough, and he would tell us to get off the chute, that he was going to draw that chute—and we would stand off twenty yards.

Q. Did you say he come up to notify you?

A. No, sir.

Q. While you were breaking that rock there, did this accident occur?

A. Yes, sir.

Q. Tell the jury how the accident was, and how you went through.

A. I went through. I think I went down within ten feet of the bottom. I went through. They say I came out of the gate after a little while after I went in. I knew everything until I was hit on the jaw here; that jaw has been pressed in.

Q. Were you unconscious when you came out?

A. Yes, sir.

Q. Whose duty was it to give the order to draw, Whelan?

A. Sam. Finley's.

Q. He the one that usually gave it?

A. Yes, sir.

Q. Gave it that evening?

A. Yes, sir.

Q. Now, Whelan, state and show to the jury, as well as you can, what was the effects and extent of the injuries you received?

A. My eye was cut down here, and a hole pushed through my cheek and a tooth knocked out. This side of my face was
31 cut down this far and a hole cut through my cheek, and a tooth knocked out, and a cut right under my eye. The doctor said when he dressed it he put three stitches in it, and the cut across here (referring to the cut across the side of his face) seven; and there was a hole through my cheek and a tooth knocked out.

Q. What was the injury to your cheek-bone?

A. The cheek-bone was crushed in and was very painful for six months afterwards.

Q. Well, what other cuts did you have on you; Whelan?

A. This wrist was cut. (Referring to the right wrist.)

Q. Well, what effect did it have on your wrist?

A. Well, the wrist was very weak. For six months I couldn't do anything at all; could hardly lift anything. I tried to do a little work, but couldn't. It is painful yet. I save it all I can. When I stop work at night it is worse.

Q. State if you suffer any pain from any of the other wounds on your face.

A. I have a pain in here from this cheek-bone being crushed in and this cut here and right down this side of my face.

Q. What other cuts and injuries did you receive there?

A. Well, this shoulder was bruised and my breast; I spit blood for eight days; the doctor said there was a blood-vessel broken.

Q. Explain the injury to the shoulder, the nature of it.

32 A. Well, this shoulder was painful, and is yet—pains me yet.

Q. State whether the injury was of such a nature that you could work afterwards.

A. Well, I couldn't do any kind of work for seven or eight months afterwards. Only this spring have I been able to do any work.

Q. State what the effects of the injury to your jaw was, whether that bothered you any.

A. Yes, it bothers me; the jaw-bone was crushed in for seven or eight months it was very sore and painful.

Q. How long did you remain in the hospital, Whelan?

A. Twenty-six days, I think.

Q. Tell the jury if you suffered much pain while in there and afterwards.

A. Yes, sir; I did.

Q. Tell the jury how long it was before you were able to do anything in the way of labor again, Whelan.

A. Well, I couldn't do anything for eight or ten months, not any kind of labor; in fact, I cannot do the work now that I could do before, and don't expect to be able to ever do the same work I was able to do before; I can't do the same work I did before, and I am not the same man.

Q. Who hired you over there, Whelan?

A. Sam. Finley.

Q. Did you ever know of Sam. discharging any men there?

A. Yes, sir.

Q. What wages were you receiving there, Mr. Whelan?

33 A. Two dollars a day and board.

Q. What doctors attended on you after you were injured, Whelan?

A. Doctor Connet, and Doctor Wyman attended me at the hospital.

Q. What has been the condition of your health since the time of that accident, Whelan?

A. Well, I haven't been near as strong since, or as healthy as I had been before; I can't stand near the fatigue as I could then; I tire out sooner and can't stand the fatigue that I use to.

Q. State to the jury whether you were going ahead with your work in the ordinary careful manner at the time this accident occurred there.

A. Yes, sir; I was breaking the rock when I went through; I had a pick in my hand and was breaking the rock when I went through.

Q. I understand you state it was the custom of Mr. Finley, prior to drawing, to go up and notify you?

A. Yes, sir.

Q. You also stated that he did not come up and notify you?

A. He did not; he never came up from the time he went down.

Q. Now, all these injuries you enumerated were made at that time, were they?

A. Yes, sir.

Cross-examination by Mr. DELANEY:

Q. What are you doing now?

A. Sir?

Q. What are you doing now?

34 A. I was working for Mr. Teck until a few days ago, when I left to attend court.
Q. How long have you been to work since you got hurt?
A. I worked two months this spring.
Q. That the only work you done since you got hurt?
A. I done some last summer.
Q. Where?
A. In Sheep creek.
Q. What kind of work did you do in Sheep creek?
A. Assessment work.
Q. How long did you work there?
A. Two months and a half.
Q. Two months again this spring?
A. Yes, sir.
Q. What have you been getting?
A. I got two dollars a day for what I done this spring.
Q. And your board?
A. Yes, sir.
Q. At Sheep creek did you work on contract or how?
A. No, sir; I did assessment work.
Q. Were you paid by the day or job?
A. By the day.
Q. What wages did you get down there?
A. Two dollars a day.
Q. And your grub?
A. Yes, sir.
Q. Who was working with you over there at the pit?
A. Archie McCormick.
Q. Archie working?
A. Yes, sir.
Q. Working together?
A. Yes, sir.
Q. On the same chute?
A. Yes, sir.
Q. How long have you been there?
A. Six months and a half.
35 Q. Altogether?
A. Yes, sir.
Q. That all the work you did for the Treadwells?
A. That is all.
Q. How long had Archie been there?
A. At the time of the accident?
Q. Yes.
A. Well, I think Archie was there a couple of months, I think.
Q. Been working together?
A. Not all the time, but we had been together some of the times before.
Q. Both been working around the pit?
A. Yes, sir.
Q. There are several chutes in there?
A. Yes, sir.

Q. Now you say Sam. Finley ordered the rock drawn at the time you went in?
A. Yes, sir.
Q. How did you know it?
A. I heard him say so.
Q. When?
A. The last term of court.
Q. All you know is what he testified to?
A. Yes, sir.
Q. That was testimony in the other trial?
A. Yes, sir.
Q. Didn't hear him give any order?
A. No, sir.
Q. You are sure Whelan, you never saw Sam. from the time he came there and told you to go up towards the chute number 17 and break rock; you never saw him again that night?
36 A. No, sir, he never came up on the chute where I was.
Q. You never saw him?
A. I did not.
Q. Didn't see him in the pit?
A. No, sir.
Q. Will you swear he wasn't in the pit?
A. No, sir.
Q. Now this was in the night-time of course?
A. Yes, sir.
Q. Have torches?
A. Yes, some torches there.
Q. You used them didn't you in helping to see the rock?
A. Sometimes we did.
Q. That is what they are for?
A. Yes, sir.
Q. Dark there that night?
A. Yes, sir.
Q. There was a torch stuck up on this pile of rock?
A. There was one there.
Q. Where was Archie when you went in?
A. Right opposite me, he couldn't have been more than seven or eight feet from me, he was very close to me.
Q. Any other fellows in the pit that night?
A. Yes, sir.
Q. Working around the other chutes?
A. Yes, sir.
Q. How far away?
A. Well, I think the closes- that were working to us down at the other chutes was, I think about 60 feet.
Q. The first doctor that attended you was Doctor Connet?
A. Yes, sir.
37 Q. Over at the other side?
A. Yes, sir.
Q. And brought you to the hospital?
A. Yes, sir.

Q. Who attended you at the hospital?
A. Doctor Wyman.
Q. How long were you in the hospital did you say?
A. Twenty-six days.
Q. Where did you go after that?
A. I stopped in a cabin after that.
Q. How long?
A. I think it would be about three weeks or a month.
Q. Where did you go then?
A. Well, the sister sent for me to see if I would set up with a man that was sick, at night and take care of him.
Q. How long did you stay there?
A. I worked there about two months and a half, I think.
Q. Wasn't you over to Treadwell's shortly after you got out of the hospital?
A. Yes, sir.
Q. How long did you stay there?
A. Two or three days, I think.
Q. Wasn't it longer than that?
A. I don't think I was there over three days.
Q. Have any talk with Mr. Duncan about it at that time?
A. Yes, sir.
Q. What was it?
A. I went to see if he would do anything for me.
Q. What did he say?

Counsel for the plaintiff objected to the above question as immaterial.

By the COURT: I think that is material.

Q. What did he say in answer to that?
38 A. Well, he wouldn't do anything; he would give me a job, but I wasn't able to go to work.
Q. Didn't he offer to allow you a month's pay for the time you were in the hospital?
A. Yes, sir.
Q. He offered you another job?
A. Yes, sir.
Q. You stayed over there about two weeks at the boarding-house?
A. I don't think I did stay so long as that.
Q. Wasn't doing work while you did stay?
A. No, sir.
Q. You finally went off?
A. Yes, sir.
Q. Afterwards brought this suit?
A. Yes, sir.
Q. You are an old miner, aren't you, Mr. Whelan?
A. Miner?
Q. Yes?
A. No, sir.
Q. Ever work in any mine before you came to the Treadwell?

A. No, sir.
Q. Never connected with quartz mining before at all?
A. No, sir; I worked in smelters around where mining was being done.
Q. Never worked in a quartz mine before in any capacity?
A. I did not.
Q. You say Sam. hired you?
A. Yes, sir.
Q. Who was this fellow Sam. discharged?
A. Dan. Sullivan.
Q. Who kept your time?
A. I said Sam. did.
Q. Who paid you?
A. Mr. Corbus.
Q. Sam. would give in your time and you would go up to the office?
39 A. Yes, sir.
Q. You went there to get your pay?
A. Yes, sir; I went there to get my pay.

Redirect examination:

Q. Whose duty was it to give the order to draw?
A. Sam. Finley's.

Recross-examination:

Q. Do you know whether the company has a rule or not requiring the foreman of the pit to notify the men when they were going to draw. That was a standing rule of the company, wasn't it?
A. Well, I was satisfied that I would be notified.
Q. You understood that to be the rule of the company. That was part of Finley's work?
A. I understood that was Finley's business—he always done that.
Q. That was one of their rules?
A. Yes, sir.

Redirect examination resumed:

Q. How do you know it was one of their rules?
A. On account of him doing it.
Q. He always did it?
A. Yes, sir.

Recross-examination resumed:

Q. Did you ever know him to fail to do it before?
A. That is the only time he failed to notify me.
Q. That is the only time that you ever knew of his failing to send notice?
A. Yes, sir.

The plaintiff in this action having no further evidence to offer, rests his case.

Thereupon Mr. Delaney, counsel for the defendant, addressed the court as follows:

If the court please, I want to submit to your honor's consideration the same proposition made by me at the last trial. However, I have, through Mr. Heid and Judge Bugbee, some additional authorities on this law proposition that was raised in the former trial as to the liability of the master for the negligent acts of co-employees; assume, of course, that the testimony now discloses that relation, and I therefore ask the reporter to enter the motion for a nonsuit on that ground that the evidence of the plaintiff discloses that he was an employee of the defendant, and that upon his testimony the evidence shows that the negligence, if any, which caused the accident was the negligence of a co-employee, to wit, Sam. Finley, and that, therefore, the company is not liable. Upon that point I desire to submit to your honor one or two recent cases that has been decided in your honor's own State. (Counsel thereupon read from the Oregon reports, and continued his argument upon the motion herein submitted.)

By the COURT: I don't think that case is overruled. I am quite familiar with these cases. I had occasion after I tried this case last year to examine those cases particularly. There is a close question here, and it seems to me to be a little difficult to define just what a colaborer or fellow-servant is. In these decisions some of the authorities lay it down where the facts are all admitted then it is the duty of the court to pass upon it as a matter of law, but the line of authorities I have examined at different times is a little
41 unsettled and vague, and I am inclined in this case to follow the same rule I made last year when I tried it. There is one very important reason perhaps, unless I was absolutely clear and felt very certain, and that a judge ought to be—perfectly certain as to the law before he takes a case away from the jury—for if he makes an error the exception can be taken and the case be dismissed anyhow; but if he should rule the other way, the whole case would have to be tried over again at a later day when the witnesses might not be procurable. I think in this case I had better submit the question to the jury than to take it away from them, and, while I admit that this is a very close point here, I think so upon the examination of the authorities; after trying the case last year I thought so then, and as to what the judge ought to do, perhaps, in regard to directing the verdict, but I shall adhere to my former rule and allow the matter to go to the jury. Of course, if Finley and this man were fellow-servants of the company and the company had a rule, and there has been some testimony from the plaintiff himself as to that, if the company had a rule requiring Finley to notify the men in the pit, and they were colaborers or fellow-servants, the company would not be liable—that is the point in the case it seems to me. This doctrine of vice-principal is a little uncertain to me so far. I know the old line of authorities, and I know the modern tendency have rather been going away from that.

Counsel for the defendant duly excepted to the ruling of the court in denying the motion.

By Mr. DELANEY, counsel for the defendant: If the court
42 please, there are some depositions on file that have not yet been open, and I would like to submit them to your honor for an order requiring them to be opened.

By the COURT: I will make the order that they be opened.

(The above order of the court was then and there executed by the clerk.)

The defendant, in order to maintain the issues on behalf of the defense, offers the following testimony:

ARCHIE MCCORMICK, called on behalf of the defendant, being first duly sworn, testifies as follows, examined by Mr. Delaney:

Q. Where are you living now, Mr. McCormick?
A. I live in Juneau at present.
Q. Were you at work for the Treadwell Company on the 23rd of November, 1891, when the plaintiff got hurt?
A. Yes, sir.
Q. Where were you working?
A. I was working in the big pit.
Q. You are the Archie McCormick he referred to in his testimony?
A. Yes, sir.
Q. Were you and he at work together that night, the night of the accident?
A. Yes, we worked together on the same chute.
Q. On the same chute?
A. Yes, sir.
Q. Now do you know Mr. Finley?
A. Yes, sir.
Q. What is his business?
A. He was the head boss in the pit.
Q. Over the rockmen?
A. Yes, sir.
Q. Have charge of the train too?
A. Yes, he had charge of the train.
Q. Did you see Finley that night?
A. I did, sir.
43 Q. Where?
A. I seen him up in the pit about seven o'clock as usual, when they put us to work.
Q. Whelan there then?
A. Yes, sir.
Q. What was Finley doing then?
A. Well, he put us to work at number 15 chute.
Q. Number 15 chute first?
A. We worked there for a certain time and then he moved us up to number 17 about 9 o'clock.
Q. In between the time you saw him at 7 o'clock and the time you went to work on 17 did you see him?

A. Yes, I saw him twice, he came up afterwards to put us to work on 17.

Q. You and Whelan?

A. Yes, sir.

Q. What did he say when he put you to work on 17?

A. Well, he told us to go up and break rocks and get it ready for the draw.

Q. Get it ready for the draw?

A. Yes, sir.

Q. Did you see him again after that, that night?

A. Yes, I seen him about ten o'clock, he came around again; he gave the order or made a motion to me with his hand to come down lower to break some coarse rock, he never ordered us off the chute at all.

Q. Made a motion to you to come down? Did Whelan see that motion?

A. I couldn't say.

Q. Did he hear Finley?

A. I don't know whether he heard Finley or not, there was two or three machines working some of the time.

Q. Did he come down to the lower side of the chute with you?

A. Yes, he come down to the lower side.

44 Q. He did come down with you did he?

A. Yes, shortly afterwards.

Q. At the time when you worked in there did you know the chute was going to be drawn?

A. I knew it was going to be drawn, I didn't know when; I wasn't notified.

Q. Well, was the place where you went to work over the chute or down below it, I mean this second time?

A. I couldn't tell exactly where the chute was.

Q. Did you know where it was?

A. He never told us where the chute was; I couldn't tell where the chute was.

Q. Well, you went to work down there where Finley directed did you?

A. Yes, sir.

Q. The last time you saw him was the last time he was in the chute?

A. Yes, sir.

Q. He made a motion for you to come down off the chute?

A. Yes, further down, I couldn't tell whether it was off the chute or on the side of it.

Q. Which side of the chute?

A. I couldn't tell.

Q. Lower or upper side?

A. I wasn't on the lower when the drop came.

Q. Where he set you to work?

A. He called me down and told me to work down here.

Q. Where was that with reference to the chute?

A. I heard him call and saw him make that motion, I don't think Whelan heard him because there was so much noise around there.

(By the COURT:)

Q. You say you heard him?

45 A. I did, yes, sir.

Q. Well, now will you answer the question as to where that was with reference to the chute, lower side or upper side?

A. Well, it was about pretty near the lower edge—that is, where he ordered me down to break coarse rock.

Q. You went to work there, did you?

A. Yes, sir.

Q. What else did Sam. say to you at the time?

A. Didn't say anything.

Q. Did you have a torch?

A. Yes, sir.

Q. Where was the torches?

A. I couldn't tell. I don't know anything about the torches.

Q. You don't remember?

A. No, sir, I do not.

Q. Did Sam. send either one of you on top of the pile to bring down the torch that night?

A. I don't recollect.

Q. Where were you when Whelan went in?

A. On the side, about eight feet from Whelan. I came very near going in myself.

Q. Which side?

A. Right over the chute; I was a little on the side.

Q. Which side?

A. Well, I couldn't tell which side.

Q. Which side, with reference to the wall of the pit?

A. Well, I was facing the wall.

Q. Which side?

A. The upper side.

Q. That is where you were when the draft came?

A. Yes, sir.

Q. How far was Whelan from you?

A. Within eight feet of me.

46 Q. How long did you break rock on the lower side of the chute before the accident happened?

A. Well, I should say about an hour or hour and a half. I can't possibly tell the time.

Q. How long was it after you commenced to work down there, that Pat. went into the chute?

A. Let me hear that again?

Q. How long was it after you commenced to work on the lower side of the chute before Pat. was drawn in?

A. Well, we was working on the lower side of the chute, and breaking rock all around the chute; we are supposed to break the rock all around it.

Q. How long was it after Finley motioned you to come down that Pat. went into the chute?

A. I should judge about an hour or hour and a half.

Q. Wasn't it about twenty minutes?

A. No, sir.

Q. Didn't you testify once it was twenty minutes?

Counsel for the plaintiff objected to the next above question on the ground that it was an attempt by counsel to impeach his own witness.

By the COURT: I don't understand that that is the object of this question.

By Mr. DELANEY: No, sir, your honor. I merely want to refresh his memory.

By the COURT: Let him answer the question.

A. I don't remember; I don't know exactly.

Q. I believe, Mr. McCormick, your deposition was taken in this case before Judge Hoyt, wasn't it?

A. Yes, sir.

Q. When was that taken, how long ago?

47 A. A little over a year ago.

Q. How long was that after the accident that your deposition was taken?

A. About three or four months, I should judge.

Q. You would be sure to remember better then than you would now, wouldn't you?

A. Oh, yes.

By Mr. DELANEY: Now, for the purpose of refreshing this witness' memory, your honor, I desire to call his attention to this deposition.

Counsel for the plaintiff objected to the introduction of the deposition above referred to, or to the witness being examined therefrom on the ground and for the reason that the proper foundation has not been laid.

The above objection was overruled by the court, to which ruling counsel for the plaintiff then and there duly excepted.

Q. Is that your signature?

A. Yes, sir.

Q. Now, then, you state here that you were standing over the chute breaking rock at the time Finley made his appearance. You recollect that?

A. Yes, sir.

Q. Now he made a motion to come down and I was the first man to come down and Whelan followed after me, and I heard him tell us to break some rock at the lower side of the chute; is that right?

A. Yes, sir.

Q. He went away then and was away most of the time; you remember making that statement?

A. No, sir; I do not.

Q. You don't remember that?
A. No, sir.
Q. Do you remember stating this: I was aware they were going to draw out of the chute into the tunnel?
48 A. I knew they were going to draw, but I didn't know when.
Q. Then you did know they were going to draw out of that chute?
A. We knew they were going to draw.
Q. The top of the chute was covered with rock?
A. Yes, sir.
Q. You didn't know exactly where the opening was; you testified to that?
A. Yes, sir.
Q. But didn't know pretty close?
A. Yes, sir.
Q. That is a fact?
A. Yes, sir.
Q. I was standing about eight feet from Pat. when the chute was drawn?

Counsel for the plaintiff objected to the manner of the examination.

By the COURT: He is introducing this for the purpose of refreshing the witness.

Q. You informed the men that Pat. had been drawn into the chute?
A. Yes, sir; I think I did.
Q. Whom did you notify, do you remember?
A. I think Thomas Halbert.
Q. You understood by Finley motioning to you that you were to get down off the chute?

Counsel for the plaintiff objected to the above question as leading.

Q. You testified in this memorandum that you understood the motion was to get down?
A. Yes, sir.
Q. In the memorandum here is the statement: It was about 20 minutes after that when Pat. went into the chute. You may
49 state to the jury, as near as you can, about the time it was after Finley made the motion to come down until Pat. was drawn in, to the best of your recollection, with this memorandum refreshing your memory.
A. Well, it might have been twenty minutes. I was taken by surprise when that evidence was taken; I was in a hurry to get away on the boat, and didn't get time to think it over.
Q. In that connection do you think that you would be more likely to remember as it was now than you did over a year ago?
A. No.
Q. Now you may state to the jury whether or not you think that

rock over the chute might have been fastened so as to have caused the accident?

A. Yes, sir.

Q. You think there was more or less jamming of it?

A. Owing to the circumstances.

Q. You concluded there was a shell or casing over the top of the chute?

A. Yes, sir.

Q. You stated that at the time the deposition was taken?

A. Yes, sir.

Q. Did you state also: I was a little doubtful of it myself, and didn't want to go ahead?

A. Yes, sir.

Q. Whelan was a little in advance of you and was drawn in?

A. Yes, sir.

Cross-examination by Mr. MALONEY:

Q. How long were you working there, Mr. McCormick, prior to the time of the accident?

A. A little over two months.

Q. Where, Mr. McCormick, was this deposition taken?

A. Over on Douglas island.

50 Q. In whose place?

A. In Mr. Duncan's office.

Q. State under what circumstances it was taken; about what time; where were you going at the time?

A. I was going to Chilkat at the time.

Q. Any rush or hurry about the taking of that deposition?

A. Yes, sir.

Q. What was it?

A. The boat blew her whistle and was ready to start out while the deposition was being taken.

Q. While the deposition was being taken, was it?

A. Yes, sir.

Q. When was it you saw Sam. Finley that evening first, the evening of the accident?

A. I seen him in the pit, he came there with us.

Q. About what time was that, Mr. McCormick?

A. A little after seven.

Q. You went to work on chute 15?

A. Yes, sir.

Q. Where did you see him next?

A. He came around about 9 o'clock.

Q. Well, when he came around about 9 o'clock what did he do?

A. Put us to work on 17.

Q. Who did he put to work on 17?

A. Myself and Pat. Whelan.

Q. Did he go up with you to 17?

A. He went part of the way up.

Q. Now explain to the jury where you went there on the level or in an elevated position?

A. In the elevated position the chute is about 20 feet deep, and is filled up and covered all over with rock, pretty near the depth of 30 feet from the top to the bottom of the chute.

51 Q. The mouth of the chute covered to that extent with rock?

A. Yes, sir.

Q. State where the mouth of the chute was Mr. McCormick.

A. No, sir, I couldn't.

Q. Now he took you there about 9 o'clock, you say?

A. About 9 o'clock.

Q. When did you see Sam. Finley again?

A. About 10 o'clock; it was 10 or maybe more, it was about 10 when he made the motion.

Q. Where was he when he made the motion?

A. About 60 feet from me at that time.

Q. He didn't come any closer when he motioned to you?

A. No, sir, he made that motion and then went down, we didn't see anything more of him.

Q. He made the motion for you to come down when he was about 60 feet away?

A. Yes, sir.

Q. After that did he do anything?

A. He went down.

Q. What time was that Mr. McCormick that he made that motion?

A. About ten o'clock.

Q. Now then, Mr. Cormick will you state whether you saw him again after that before the accident?

A. No, sir, I didn't.

Q. Then from the time he motioned to you to come down there, which was about 10 o'clock up to the time of the accident, you didn't see him again?

A. No, sir.

Q. Didn't?

A. No, sir.

Q. About what time did the accident occur Archie?

52 A. It occurred about half an hour, or an hour, or an hour and a half afterwards. I couldn't possibly tell exactly.

Q. About an hour or an hour and a half after that motion?

A. Yes, sir.

Q. You saw Whelan when he went in, did you?

A. Yes, sir.

Q. Did you give notice to the other men that he went in there?

A. Yes, I did sir.

Q. Did you assist in taking him out?

A. Yes, sir.

Q. He was unconscious was he?

A. Yes, sir.

Q. Was Sam. Finley along about that time?

A. No, sir.

Q. Didn't see Sam. when you took him out?

A. No, sir.
Q. Do you know whether Whelan saw the motion that Finley made to you or not?
A. I don't think he did.
Q. Now what was the custom with Finley when he went to notify you boys he was going to draw?
A. Well, it was customary for him to come up and look over the chute and see if the rock was broke fine enough to draw and then say Boys I am going down and order the other men to draw.
Q. Did he do it on that evening?
A. No, sir; he did not.

Redirect examination:

Q. Did he motion to you to come down off the chute?
A. He did; yes.
Q. And did you come down?
A. Yes, sir.
Q. Both of you; you and Whelan both?
53 A. Well, Whelan came down after awhile.
Q. He did come down, didn't he?
A. Yes, sir.

Recross-examination:

Q. When you testified in your direct examination, did I understand you to say that this rock covered quite an area across the mouth of the chute where it fell down from the bluff; and when you say he motioned to you to come down he meant to the lower end of the chute where there was some rock?
A. Yes, sir.
Q. When you came down there, you didn't go off the chute entirely?
A. I couldn't tell, there was so much rock there.
Q. Just came lower down on the chute?
A. Just lower down, and broke some coarse rock.
Q. And then what?
A. And then worked around until we got it finished; we are supposed to break all the rock there.

Redirect examination resumed:

Q. You state, Mr. McCormick, that this deposition was taken in a hurry?
A. Yes, sir.
Q. Mr. Maloney examined you that day?
A. Yes, sir.
Q. Did you state on that examination that Finley motioned for us to get off the chute entirely when he motioned for us, in answer to Mr. Maloney?
A. I understood it to come down.
Q. Did you state that it was to get off the chute?
A. I said we came down.

Q. All that occurred before the accident complained of, didn't it?
A. Yes, sir.
54 Q. Then you went to work, as I understood it, breaking rock again?
A. Yes, sir.
Q. And you gradually worked your way up over the chute?
A. We are supposed to do it.
Q. Ain't that a fact, sir? You want to answer the question fairly?
A. Yes, sir.
Q. All right, then; after you worked up over the chute the accident happened and Whelan went in and you didn't?
A. Yes, sir.
Q. You didn't go in because you were off the chute?
A. Yes, sir.

Counsel for the defendant then read the deposition of Antone Anderson and offered the same in evidence, which was admitted by the court, and which is as follows:

Deposition of Andrew Anderson, produced, sworn and examined at the office of Delaney and Gamel in the town of Juneau, Alaska, on the 21st day of May, 1892, by stipulation of parties, in writing, hereunto annexed, before me, the undersigned, a United States commissioner in and for Alaska, in a certain cause now pending in the United States district court for the district of Alaska, wherein Patrick Whelan is plaintiff and The Alaska Treadwell Gold Mining Company is defendant, on the part of the defendant. And the said Andrew Anderson, of lawful age, being first duly sworn by me to tell the truth, the whole truth, and nothing but the truth, testified in manner and form as by his deposition set forth, hereunto attached, and that his deposition was reduced to writing by E. O. Sylvester and subscribed by him in my presence on the 21st day of May, A. D. 1892, between the hours of 10 a. m. and 12 m. of the said
55 day, at the place aforesaid, J. F. Maloney, Esq., appearing for the plaintiff and Delaney and Gamel appearing for defendant.

[SEAL.]

W. R. HOYT,
United States Commissioner.

In the United States District Court for the District of Alaska.

PATRICK WHELAN, Plaintiff,
vs.
ALASKA TREADWELL GOLD MINING COMPANY, Defendant. } No. 319.

Testimony of Andrew Anderson, taken by and before me, the undersigned United States commissioner, on this 21st day of May, 1892, in behalf of the defendant, in pursuance of the stipulation hereto attached, J. F. Maloney appearing for the plaintiff, and Delaney and Gamel for the defendant.

ANDREW ANDERSON, being duly sworn, testifies as follows:

Examined in chief by Mr. DELANEY:

My name is Andrew Anderson. My age is thirty-one years. I have been at work for the defendant company for about two years. I was at work there the night that Patrick Whelan got into the chute. On that night I was breaking rock in the pit at chute No. 16. This was about ten yards from where the feilows Pat. and McCormick were working on chute No. 17. I saw Sam. Finley in the pit that night. He was all around in the pit. I saw him at
56 No. 17 and at No. 16, and all around. I didn't hear him say anything, but I saw him make a motion with his hand. (Witness illustrates by waving his hand back and forth extended, and pointed towards the ground.) When I saw him make this motion, Pat. and another man was there. I believe they call the other man Archie. When I saw them at that time they were about four or five feet, maybe closer than that, to the mouth of the chute. They were about ten or fifteen feet away from Sam. at the time I saw him make the motion. Sam. came down to chute No. 16 where I was working, before he went up to chute No. 17, and he told me to go up the bank and roll down some big boulders to blast at supper time. I went up on the side to roll down the big rocks, and while I was up there I saw Pat. Whelan go into the chute, and then I ran down and notified the chute boss.

Cross-examination by Mr. MALONEY:

I don't understand the English language very well. Thomas Haggert and four or five other fellows whose names I don't remember, were working with me at chute No. 16. When I saw Sam. talking, I do not know what he was saying. I don't know what he meant by the motion, but I thought he meant to do something. After Whelan went through the chute, I went to the drying-room to tell Sam. that a man was in the chute. I found Sam. right in the door of the drying-room, and he went into the tunnel with me. From the time I saw Sam. talking to Pat. at chute No. 17 to the time he went in might have been 10 or 15 or 20 minutes.

(Signed) ANDREW ANDERSON.

57 THOMAS HAGGART, called on behalf of the defense, being first duly sworn, testified as follows:

Examined by Mr. DELANEY:

Q. What is your name?
A. Thomas Haggart.
Q. Are you working for the Treadwell Company?
A. Yes, sir.
Q. How long have you been there?
A. This time, since the 28th of February.
Q. Did you work there on the 23rd of November, 1891, the night Patrick Whelan got hurt?
A. Yes, sir.
Q. Where were you working there?
A. In the pit.
Q. How long had you been there?
A. I don't remember how long I had been there that time.
Q. How long had you been at work?
A. I don't remember how long I was working before the accident.
Q. Well, were you there when the plaintiff came to work?
A. No, sir.
Q. Did he come after you or before?
A. Before.
Q. Where were you at work that night—on the chute?
A. Yes, sir.
Q. With Mr. Anderson?
A. Yes, sir.
Q. He worked with you that night, did he?
A. Yes, sir.
Q. Do you remember whether there was anybody else working with you or not, if so who?
A. T. Mathews, and a fellow by the name of Charlie.
58 Q. Working with you at the time the accident happened?
A. Yes, sir.
Q. Well now, did you see the plaintiff at the time he went into the chute?
A. Yes, sir.
Q. Did you see McCormick?
A. Yes, sir.
Q. I want you to state to the jury how the accident happened, tell what you saw.
A. Well, they broke rock on chute No. 17 and they worked up on the chute until they came to the top and they started down off the chute, the lower part and just as they came to the center of the chute Whelan dropped in; McCormick jumped to the side, the upper side of it, and escaped from going in.
Q. What tools did he have?
A. A pick and a hammer.
Q. A torch there anywhere?
A. Yes, a torch sitting there.
Q. Did the torch go into the chute?

A. I don't remember, I don't think it did.
Q. They brought down their tools to go to the lower side?
A. Yes, sir.
Q. And Pat. went through the top of the chute and dropped in and the other fellow got on the other side?

Counsel for the plaintiff objected to the above question as leading; whereupon the question was withdrawn and the following asked:

Q. Now, Mr. Haggart, did you see Finley in the pit that night?
A. Yes, sir.
Q. How often?
A. I seen him maybe once about seven o'clock.
Q. Well, did you see him again?
A. Yes, sir.
59 Q. What time?
A. I couldn't tell just the time.
Q. Who was he with at that time?
A. Well, he came in the pit there and motioned for them to come down, and when he motioned to them I think he wanted them to work below.
Q. Did they come down?
A. Yes, sir, they came down.
Q. After he made the motion?
A. Yes, sir.
Q. How long was that before Pat. went in?
A. I couldn't say how long it was; they worked over up on the chute and was coming down when the accident happened and he went in.
Q. How far was this chute 16 from 17; how far were you from Pat and Archie?
A. I don't think I was more than twenty-five or thirty feet, might be more or might be less.
Q. The Burleighs running, were they?
A. Yes, sir.
Q. Now, Mr. Haggart, do you know whether there had been any rock drawn out of the chute at the time Pat. went in? Out of seventeen?
A. Well, I didn't see them draw out of it before they worked on it.
Q. You don't know anything as to whether the rock was lodged over the top of the chute or not at the time Pat. went in?
A. Yes, it must have been lodged or else he wouldn't broke in.

Counsel for the plaintiff objected to the witness testifying to what must have been as being a mere conclusion.
60 By the COURT: If he knows; if he is familiar with that work so he can show how the accident might have been, I think it is competent.

Q. Go —, Mr. Haggart, you started to explain about the top of the chute.
A. Well, when they draw from the chute it sometimes lodges and

forms a sort of a bridge, and sometimes it has to be blasted out and sometimes it drops down itself.

Q. What conclusion did you come to about chute No. 17?

Counsel for the plaintiff objected to the above question for the reason that the witness has not been shown that he is competent to state.

By the COURT: He can tell if he has any knowledge about it; of course, if he don't know he cannot tell.

A. I know they lodge up there when we work on the chutes, before that and since.

Q. That occurs once in a while?

A. Yes, sir.

Q. Well, now, was chute 17 lodged that way that night?

A. It must have been; they drew out several cars, and it didn't start from the top when he was on it, and then it started down all at once.

Q. How high is the top of chute No. 17, about?

A. Well, at that time I should judge it was about 20 feet or about there somewhere, maybe more, from the edge of the rock to the bottom of it.

Q. Figuring that from the level of the top?

A. From the level of the chute.

Q. You saw Pat. in the tunnel after they opened the gate?

A. Yes, sir.

61 Q. You was there when the gate was opened?

A. Yes, sir.

Q. How high up was he?

A. Well, there was considerable rock in the chute.

Q. State whether there was rock enough come out to anywhere near fill the chute when the gate was opened?

A. No, sir.

Q. Had you ever worked on 17 also?

A. I don't remember; I must have, of course; we generally work on whatever chute comes.

Q. Did you know where the mouth of the chute was?

A. Well, it is pretty hard to tell when there is much rock on it.

Q. You can tell pretty near it, can't you?

A. It is pretty hard sometimes — where the mouth should be when there is much rock on it.

(By the COURT:)

Q. When you are familiar with that work, how near could you come to telling where the mouth is?

A. Within eight or ten feet.

Cross-examination by Mr. MALONEY:

Q. You are in the employ of the company, are you at present?

A. Yes, sir.

Q. You were in the employ of the company at the last time we tried this suit also, Mr. Haggart?

A. Yes, sir.
Q. What were you doing that evening, working chute 16?
A. Yes, sir.
Q. You were attending to what you were doing at the time, your own work?
A. I was.
Q. You wasn't watching Whelan and Archie McCormick?
62 A. I happened to be looking at that time.
Q. You looked around for what might happen?
A. Yes, sir.
Q. Did you expect anything to happen?
A. Lots of times there are boulders roll down the bluff.
Q. You were looking out for yourself rather than for them?
A. Yes, sir.
Q. Then you wasn't watching Whelan particularly, were you?
A. No, sir.
Q. Not watching how their chute got along there, were you?
A. No.
Q. As a matter of fact, you didn't know of your personal knowledge whether that jammed up there or not?
A. I know for a fact that it could jam up.
Q. Do you know that it was on that occasion, sir?
A. Yes; I know it was.
Q. Did you go there and examine it?
A. No, sir; that is my opinion.
Q. Do you know from examining it?
A. Examining what?
Q. The chute.
A. I examined it after the accident.
Q. Where?
A. On top.
Q. You went up for the purpose of examining it, did you?
A. No; when we went up there we examined the chute.
Q. At the time of the accident to what depth was the chute covered with rock?
A. I couldn't say.
Q. About how much?
63 A. There was probably eight or ten feet of rock about the chute.
Q. You say eight or ten feet; might there not have been twenty-five or thirty feet?
A. No, not 25 or 30.
Q. Is that the chute next to the wall of the bench?
A. Yes, sir.
Q. Does the rock coming down from the bench cover that more?
A. Yes, sir.
Q. Will you swear there was not fully twenty-five or thirty feet of rock over the chute at that time?
A. No, there was not 25 or 30.
Q. How much?

A. I don't think more than eight or ten feet at the lower side of the chute. On the slope there might be more.

Q. At the lower side, how wide is the chute?

A. I should judge about eight or ten feet wide at the top.

Q. Now, then, if at the lower side of the chute there was eight or ten feet of rock in depth, how much was there at the upper?

A. Well, there might be fifteen or twenty.

Q. Might be twenty-five or thirty feet, might there not?

A. Not right perpendicular from the chute; of course on the slope.

Q. There might have been that much?

A. On the slope there might.

Q. Now then, that chute is ten feet wide you say, about that?

A. Yes.

Q. How deep?

64 A. Between twenty and thirty feet.

Q. Now, then, eight or ten feet of rock at the lower side?

A. About that.

Q. The upper side might be twenty-five or thirty feet there, might be?

A. Yes, sir.

Q. Do you mean to tell this jury that wouldn't more than fill the tunnel?

A. Not all go in.

Q. That rock piled there would cave in, wouldn't it?

A. I don't understand what you mean.

Q. That amount of rock, eight or ten feet deep on the lower side of the tunnel, or rather chute, and sloping up to twenty-five or thirty feet against the bench, wouldn't that more than fill the tunnel or chute?

A. Yes, it would more than fill the tunnel, if it reached down below.

Q. Answer, if that amount of rock on the surface there, wouldn't that more than fill it?

A. I don't think it would.

Q. You didn't go over and examine that chute, did you, before the accident occurred?

A. No, I wasn't working there.

Q. Who went with you afterwards?

A. All of us.

Q. Who are all of us; who are they?

A. Archie McCormick; he came up I believe.

Q. Would you swear he did? Don't you know he didn't?

A. No, I don't know.

Q. You don't know that he did, do you?

A. I wouldn't be positive that he did or not.

Q. Who else went up?

A. The crowd working in there.

Q. Who is another one?

65 A. A fellow by the name of Charlie.

Q. Where is he?

A. I don't know where he is.

Q. Who else?
A. I don't know the names of them.
Q. As a matter of fact, did anybody go up?
A. Yes, sir.
Q. Yet they are all gone away?
A. I don't know where they are.
Q. What did you state that Whelan was doing when you saw him go down into the chute?
A. Coming down off the slope.
Q. What did he have with him?
A. A hammer and a pick.
Q. What position did he have the hammer in?
A. In his hand.
Q. And the pick?
A. In his hand, right hand.
Q. Now, as a matter of fact, at the time this accident occurred, wasn't Whelan breaking rock?
A. No, sir.
Q. What was your object in looking at him?
A. I didn't have any particular object.
Q. Just stood there to watch him?
A. I was watching him.
Q. Watch him closely?
A. I kept looking at him.
Q. Was there anything extraordinary that caused you to look at him?
A. I was looking at him when he went in the chute.
Q. Wasn't it the custom for the boss to notify you when they went to draw?
A. Yes, sir.
Q. What was the cause of your uneasiness, you knew he would notify you?
A. Yes, sir.
66 Q. What made you uneasy?
A. I didn't know when they might draw.
Q. He would be likely to come and tell you, wouldn't he?
A. Yes, sir.
Q. What made you keep looking at Whelan?
A. Well, when we hear a noise we generally look around to see the cause of it.
Q. There was a couple of Burleigh drills running there, wasn't there?
A. Yes, sir.
Q. What noise was it that caused you to look around?
A. They were drawing in the chute at that time.
Q. What time was it that Sam. was around there?
A. I couldn't state the time; he was there and made a motion to come down.
Q. Come down where?
A. Down off the chute to work lower down.
Q. That was what you understood by it?

A. Yes, sir.
Q. You watched Sam.?
A. Yes, sir; when he came in we generally see him come around.
Q. How far away was he from them when he motioned to them?
A. Maybe forty of fifty feet, maybe more or less.
Q. Did he say anything to them?
A. I couldn't hear.
Q. You saw him after that again?
A. No, he went in the tunnel and I didn't see him any more.

67 Q. You didn't see Sam. go right up to these men within a few feet of them?

A. No, sir, he made a motion along the bottom of the chute.
Q. The lower side of the chute?
A. Yes, sir.

Redirect examination:

Q. Mr. Haggart, there is one thing I think you might state to the jury so as not to mislead them. You have testified with Mr. Maloney about the rock being piled up. Now what was the rock backed up against on the upper side, against the wall of the bench?
A. Yes, sir, the slope.
Q. How far about from the wall of the big pit to the chute is it?
A. Right on the edge of it.
Q. The chute runs right down from the edge of the pit. I mean the surface of the wall where the rock comes down, with reference to that wall to the chute in distance between the wall and the chute?
A. The slope goes up from the top of the chute.
Q. You think the chute goes to the wall, close to it; and you think there might have been 20 or 25 feet of rock there?
A. Yes, sir.
Q. Now, at the time that you saw Finley and McCormick and Whelan together, at the time he was making the motion, were they below then at that time?
A. They were down at the lower side.
Q. Over the chute or below it?
A. The lower side of the chute.
Q. That is the last time you saw Finley before the accident happened?
A. Yes, sir.

68 Q. You say you can hear the rock going down into the cars?

A. Yes, sir.
Q. Did you know at that time that they were drawing out of 17?
A. I didn't know exactly where they were drawing.

(By the COURT:)

Q. You knew they were drawing from some of the chutes?
A. Yes, sir.

Recross-examination:

Q. Wasn't Whelan and Archie there when you heard that noise?
A. Yes, sir.
Q. You can't say whether they heard it or not?
A. No, sir.
Q. You knew not what chute they were drawing?
A. No, sir.

Testimony of Samuel A. Finley, witness in behalf of the defendant, taken before W. R. Hoyt, United States commissioner, residing at Juneau, district of Alaska, in pursuance of the foregoing stipulation, on December 28th, 1892, at 2 p. m. of that day.

Present: J. F. Maloney, Esq., attorney for plaintiff, and Messrs. Delaney and Gamel, attorneys for the defendant, by John S. Bugbee, their representative, also E. O. Sylvester, appointed by said commissioner to take said depositions in writing.

SAMUEL A. FINLEY, being first duly sworn and interrogated by the attorneys for the defendant on the direct examination, testified as follows:

Q. State your name, age, residence and occupation.
A. Samuel A. Finley; 38 years of age; residence, Douglas island, Alaska; occupation, miner.
69 Q. By whom have you been employed recently in Alaska?
A. The Alaska Treadwell Gold Mining Company.
Q. How long have you been employed by said company?
A. Since May or June, 1887.
Q. In what capacity were you first employed?
A. Breaking rock, doing different jobs, striking hand drills, worked in the drifts, on the cars—one day it would be one job, the next day it would be a different job.
Q. How long have you been employed in the pit?
A. I have been employed in the pit ever since I have been there, but four years foreman in the pit or shift boss.
Q. How long have you been shift boss?
A. About four years, little more or maybe a little less.
Q. What shift did you have charge of?
A. Night shift.
Q. Who was your immediate superior during that employment?
A. Mr. Duncan was.
Q. All the time?
A. I worked for Joe Farnsworth when he was foreman there; then for George Blake; then for Mr. Duncan.
Q. Under whom were you working from the first day of November, 1891?
A. Mr. Duncan.
Q. What was his position in the company?
A. Head foreman.
Q. Was he head foreman of the whole mine and works?
A. All the mining part of it.

Q. Was the head foreman having charge of the pit in the month of November, 1891?

70 A. Yes, sir; he had charge of the pit.

Q. Who was immediately under him in authority in that month?

A. The day boss comes next to him.

Q. Who was the day boss in that month?

A. I think that was Jack Scouse was the day boss then.

Q. To whom did you report and from whom did you receive your orders during that month?

A. I received my orders from Mr. Duncan.

Q. Do you know what Mr. Duncan's duties and authority as your superior officer were during that time?

Objected to by counsel for the plaintiff on the grounds that it is immaterial and irrelevant.

A. Yes, sir; he was head foreman and looked after everything.

Q. Did you as foreman ever hire or discharge or were you ever authorized by anybody to hire or discharge the workman under you?

A. I couldn't discharge and I couldn't hire.

Q. Do you know the plaintiff in this action?

A. Yes, sir.

Q. How long, if ever, was he employed upon the pit?

A. I don't know, perhaps five or six months.

Q. Did you hire him?

A. No, sir.

Q. Did you ever discharge him?

A. I never discharged him.

Q. As foreman of the night shift, who was immediately under you?

A. Everybody that worked there in the night shift.

71 Q. What were all the men working under you engaged in?

A. Some were on the cars, some breaking rock, some packing drills, some shoveling down in the drifts, some working in the pit.

Q. What were your duties as foreman of the night shift?

A. To see that everybody that was there did their work and fill the mill.

Q. What were the duties of the plaintiff under you while you were foreman of the night shift?

A. To do whatever I told him.

Q. What did he do under your directions generally?

A. Break rock and shovel.

Q. To break rock and shovel; for what purpose?

A. To fill the mill and the chutes.

Q. How long had he been engaged in breaking rock to fill the chutes?

A. I suppose five or six months working at it.

Q. Was he familiar with the location of the chutes in the pit during that time?

A. Well, I think he was.

Q. Do you remember the night of the accident complained of in this action?

A. I forget the date.

Q. Do you remember the occurrence?

A. Well.

Q. On that night before the accident, on what chute, if any, had Mr. Whelan been breaking rock for?

A. Seventeen.

Q. How many chutes were you operating on that night?

A. Hauling from 16 and 15. Hadn't touched 17.

Q. On what chute did the accident occur?

72 A. Seventeen.

Q. By whose direction did the plaintiff break rock on chute 17?

A. Why, I told him.

Q. Who else broke rock on that chute with plaintiff that night?

A. Archie.

Q. Archie who?

A. Archie McCormick.

Q. Did you draw chute 17 that night?

A. About half past eleven, twenty minutes to twelve, somewhere in that neighborhood.

Q. Before drawing the chute what did you do?

A. I called him and Archie both off the chute. Told him not to go up there any more and he started down and left his torch up there and I made him go back and get it, and come down, both of them came down to the bottom where I was at and I showed them where to work.

Q. Where did you show them the place to work?

A. Well, it must have been 12 or 15 feet away from the chute.

Q. Was that a safe place for them to work in?

A. Yes, sir.

Q. Did they go back to work at the place you pointed for them?

A. I went down there to call them off and told the chute boss to draw.

Q. Answer the question, did they go back to the place appointed for them to work?

A. They left that and started again over the top of the chute.

Q. Did you see them leave the place and go to the top of the chute?

73 A. I didn't see them, but they went up above it, it must have been about thirty feet, and he walked and went right over it and it caved in with him.

Q. How do you know they did when you didn't see them?

A. Only what the men told me who was there, working right there.

Objected to by the attorney for the plaintiff on the ground that it is hearsay evidence.

Q. What did you say to them or either of them before they left the chute?

A. I told them not to go near the chute they was going to draw there; there was nothing for them to do there and to keep away from there.

Q. What did Mr. McCormick do then?

A. He started back over the chute with him too. And came very near going in himself.

Q. What did the plaintiff do when you told him you were going to draw?

A. He came down below and started to work at one side and then I left him.

Q. How long was it after you notified them to come down that you were about to draw the chute that you did actually draw it?

A. About twenty minutes, I guess.

Q. How long after you notified them that you were going to draw was it before you left the pit?

A. About twenty minutes, I guess.

Q. When you left the pit where did you go?

A. I went down and told them to draw, and then I went
74 out to the dry-room to get some powder, to blast boulders with just going off at 12 o'clock.

Q. During that twenty minutes that you remained in the pit after you notified them to come down from the chute where did these men work?

A. At the place I put them away off at one side.

Q. During that twenty minutes, or while you remained on the pit did you see the plaintiff engaged in work upon the chute or above it or so near to it as to be in any danger?

A. No, sir.

Q. What kind of *of* a night was it?

A. It was a kind of a cold night with a little wet snow, frosty, I don't exactly remember the kind of a night.

Q. Was the chute on which these men were working artificially lighted?

A. I don't remember whether there was a moon or not. There was no electric light, only torches.

Q. Could you see them men while you were working on this chute?

A. Oh, yes, sir, I could see the whole of them in the pit.

Q. Could you hear the voices of these men while they were working?

A. I could if they was talking, speaking to me.

Q. Could they have heard you equally as well?

A. Oh, yes, sir.

Q. Did the plaintiff hear you call for him to come down off the chute?

A. Yes, sir.

Q. How far off were you from plaintiff when you called to him to come off the chute?

75 A. Within about two or three feet of him.

Q. When you notified the plaintiff to come down from the chute, did he bring his tools with him?

A. He brought his tools, but left his torch on top, up above the chute. And I sent him back after it, and he brought it down. And I showed him a place to work away off on one side, and told him not to go up there any more.

Q. Was the place where you put him to work a safe place?

A. Yes, sir; it was.

Q. If he had remained at that time at work, would he have fallen through the chute?

A. No, sir.

Q. Was the mouth or opening of the chute through which he fell to be easily recognized by a man experienced in breaking rock for the chute?

A. Yes, sir.

Q. Did you at that time know where the mouth of the chute was?

A. Yes, sir; I knew where it was.

Q. Did plaintiff know where it was?

A. I think he did. He was working round there all the time at that time; he knew where it was; he didn't want to know where it was; he was called off; he worked in there five or six months around those chutes.

Q. Was there any danger in working on chutes or around them, except when the chute was being drawn?

A. Not a bit.

Q. If the plaintiff had been careful in his work, or if he had followed your directions, could the accident have occurred?

76 Objected to by the plaintiff's counsel as suggestive and leading.

A. No.

Q. Do you know whether or not the chute was in an ordinary safe condition for drawing at the time you notified them to come down from it?

A. Yes, sir; perfectly safe.

On cross-examination by Mr. Maloney, witness testifies as follows

Q. Are you the same Sam. Finley who testified at a former trial of this cause?

A. Yes, sir.

Q. On or about the date of this accident, what position did Mr. Duncan hold under the Alaska Treadwell Gold Mining Company?

A. Head foreman.

Q. Who was the superintendent?

A. Captain Mein was the superintendent.

Q. Was he there at the time of the accident?

A. I don't know whether he was or not.

Q. Who was the superintendent after Captain Mein left?

A. Mr. Duncan, I think, has taken his place.

Q. From whom did you receive your orders?
A. From the foreman.
Q. From what foreman?
A. The day-shift foreman when he was there; he got his orders from Mr. Duncan.
Q. Did you get any orders from Mr. Duncan?
A. Yes, sir, when he was there; and from the day-shift boss when he wasn't there.
Q. From whom did the men under you receive their orders?
A. From me.
77 Q. Did they receive any orders from Mr. Duncan or from the day-shift boss?
A. Not the workingmen; they received their orders from me.
Q. Was the plaintiff here, Whelan, one of the workingmen?
A. He was.
Q. How do you happen to know the duties and authority of Mr. Duncan as superintendent or foreman?
A. I don't know his duties as superintendent. I know he is a superintendent now, and he was a foreman before.
Q. Did you, as foreman or shift boss, ever hire or discharge any of the men under you?
A. No, sir.
Q. Did you hire Mr. Whelan?
A. No, sir.
Q. Did you ever discharge a man known as Red or Brick-top, whom you saw at the last term of court here?
A. No, sir, I couldn't discharge him.
Q. Did you ever hire or discharge any man under you there?
A. No, sir.
Q. Where were you when you called Archie McCormick and Whelan from off the chute?
A. I was right on the chute.
Q. How far from them?
A. About thirty feet when I called to them.
Q. Did you so testify at the trial of this cause before?
A. I did; yes.
Q. What did you say to them when you told them to come down?
A. I called them down off the chute, and to come down where I was, and he left his torch up above. I told him to go back
78 and get it. He wasn't going to work any more—to come off to one side to work. So he got his torch and came down, and I put him away off to one side to work, and left him there. I told him I was going to draw there; there was nothing for him to do there any more, and to come down off one side, and they did so.
Q. About how far was it to come down where you were?
A. They wasn't working at all then; I had called them down, and was right there with them.
Q. Did you so testify at the previous trial of this cause?
A. I did testify.
Q. Did you so testify?

Objected to by counsel for the defendant on the grounds that the question is incompetent, and that the witness must be shown the testimony taken at the trial or asked *that* the truth of the facts then testified to by him.

A. I did, yes.

Q. About how wide is the opening or mouth of that chute near where they were working?

A. It is about six feet, I guess.

Q. Was the chute exposed to view or covered over?

A. The chute was full.

Q. Was it not covered over to a considerable depth by rock and debris?

A. It was full, of course, with rock.

Q. Now, answer the question.

A. It was covered over with dirt or decayed rock—loose dirt.

Q. Could the mouth of the chute be seen?

79 A. You could see where the chute was at, but you couldn't see the chute because it was full of dirt.

Q. Was not the ground for a considerable area around the chute covered with the same rock and debris?

A. Just right around the chute was all.

Q. What was there in the appearance in the mouth of the chute to distinguish it from other ground covered with rock?

A. Decayed loose rock—more like ashes.

Q. Was it not the same as the other rock around the mouth of the chute?

A. No, sir.

Q. Did you testify at the last trial of this cause that you motioned to the men to come down?

A. I called them down, didn't motioned.

Q. Did you testify to that, yes or no?

Objected to by counsel for defendant on the grounds as mentioned in the last objection by him.

A. I don't think that I did.

Q. How long after you told them to come down did the accident occur?

A. Well, I called them down, and I had to go down and tell the man below to draw; he couldn't draw until I went down and told him. They dare not draw a chute until they are told. About a half hour, twenty-five minutes, or something like that after I told them, the accident occurred.

Q. How long did you stay in the pit after telling them to come down?

A. I don't know exactly how long—a few minutes; I had to go down and tell them to draw.

80 Q. After telling them to come down, did you go immediately and tell them to draw?

A. I did after bringing them off the chute.

Q. Where did you go after giving the order to draw?

A. I went to the dry-room to get powder.

Q. How long were you in the dry-room before the accident occurred?

A. Why, I was there a few minutes—long enough to get powder and fuse, and started back. I couldn't tell exactly how many minutes it was.

Q. Were you there a half an hour?

A. No.

Q. Did you state at the last trial of this cause that you were not in the dry-room at all just previous to the accident?

A. No, I was out in the tunnel when the man came running. I had powder and stuff, and was just starting back to the pit again.

Q. What did McCormick or the plaintiff say when you told them to come down that you were going to draw?

A. They said all right.

Q. Which of them said all right?

A. Both of them, I think; both of them were standing together.

Q. Were the Burleighs drills running that night?

A. I don't know whether they was or not. If they did they was away up on top and wouldn't have made any noise.

Q. Did you testify at the last trial of this cause that when you called or motioned to the plaintiff that he was about thirty feet above you?

81 Objected to by the defendant on the same grounds last stated.

A. No, I don't think he did.

Q. How was the mouth or opening of the chute to be recognized by a man experienced in the breaking of this rock?

A. The chutes is and can tell about the distance of them. You have to punch them down sometimes with a drill or bar when they get stuck, so you have to know exactly the place where they are.

Q. Is not the fact of the chute being full and covered over the reason why you could not tell where the mouth was?

A. No.

Q. Was the rock in the mouth of the chute about the same as that surrounding it?

A. Yes, sir; around the chute it was.

Q. How do you know that the plaintiff knew where the mouth of the chutes was?

A. He didn't want to know where the mouth of it was because he was taken away from the mouth of the chute.

Q. Do you think that the plaintiff fell in purposely?

A. Well, it looked a little careless on his part, as he wanted to fall in after being brought away from it altogether.

Q. Was Archie McCormick near the mouth of the chute when the accident occurred?

Objected to by defendant as immaterial and irrelevant because witness was already testified that he was not present when the accident occurred and had no personal knowledge on the subject.

A. Well, I wasn't there when it occurred.

82 Q. Did you know at the time you gave the order for them to come down where the mouth of the chute was?

A. Yes, sir.

Q. Did you so testify at the last trial of this cause?

Objected to by defendant on the same grounds mentioned in the last objection.

A. I think I did.

On redirect examination by the defendant witness testifies as follows:

Q. When you testified in your cross-examination that just previous to the accident that you were in the tunnel, did you mean that you had just left the drying-room with your powder and fuse and had then gone to the tunnel, or that you had gone directly from the pit to the tunnel?

A. I was going from the drying-room up to the pit.

Q. Had you anything to do with the running of the Burleigh drill?

A. I had to see that they ran. I had charge of them.

(Signed) S. A. FINDLEY.

UNITED STATES OF AMERICA, } 88:
District of Alaska, Town of Juneau, }

I, W. R. Hoyt, a commissioner of the United States, residing at Juneau in the district of Alaska, do hereby certify that under the stipulation hereto annexed Samuel A. Findley, a witness in behalf of the defendant in the suit of Patrick Whelan *vs.* The Alaska Treadwell Gold Mining Company, appeared before me at Juneau on December 28th, 1892, and on and between the hours of ten

83 a. m. and five p. m. of said day his following deposition was taken before me and reduced to writing by E. O. Sylvester, a disinterested party, in my presence and under my direction; that before proceeding to the examination of said witness he was by me duly sworn to tell the truth, the whole truth and *and* nothing but the truth; that when completed, said deposition was read to said witness and by him subscribed.

In witness whereof, I have hereunto set my hand and affixed my official seal as such United States commissioner this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.]

W. R. HOYT,
United States Commissioner.

ARCHIE MCCORMICK, recalled on behalf of the defendant, and examined by Mr. Delaney, testified as follows:

Q. How long did you work that night, all night?

A. No, sir; I didn't; I worked until about 20 minutes to twelve.

Q. Where did you go?
A. After the accident I went down to the boarding-house.
Q. Have any talk down there about it?
A. No, sir.
Q. Have any talk that night with anybody about the accident?
A. No, sir.
Q. Mr. McCormick, don't you remember of having a conversation with Collins about the accident that night?
A. No, sir, I did not.
Q. Don't you remember of explaining to him in the boarding-house how the accident occurred?
84 A. No, I don't remember anything of the kind.
Q. Don't remember of telling him that Finley ordered you down?
A. No, sir, I do not.

Cross-examination by Mr. MALONEY:

Q. Do you remember of telling Aims on the evening after the accident that Finley didn't order you down?
A. No, sir, I don't remember it.

ROBERT CURNOW, called on behalf of the defendant, being first duly sworn, testifies as follows:

Examined by Mr. DELANEY:

Q. What is your business Mr. Curnow?
A. Foreman of the Treadwell mine.
Q. How long have you been in that capacity?
A. Since November, 1891.
Q. Just a little before the accident?
A. Had just taken charge, sir.
Q. A few days before?
A. Yes, sir.
Q. Do you know the different departments that are engaged with the operation of that mine?
A. Yes, sir.
Q. I wish you would state to the jury what the system is of running the mill and the mine and was at that time?
A. Well, the mine and the mill and the chlorination works are under different foreman, I am at the mine, I have nothing to do with either one of the other departments.
Q. And the whole under what?
A. Under the general manager.
Q. Was Mr. Duncan the general manager at that time?
85 A. Yes, sir, Mr. Duncan had just taken the general managership and I had just taken his place.
Q. So you went into his shoes?
A. Yes. sir.
Q. Now in connection with that department, that pit, who is in charge of the men?
A. I am sir.

Q. Who discharged them?
A. I did.
Q. What, if any authority, have any of the men under you to hire and discharge men, explain what there is about this boss business?
A. Of course there is three or four; there are three shift bosses on the day shift and one at night, all of which I hire and discharge as it suits me.
Q. Well, these men, how do they get their authority, from you?
A. Yes, sir, I hire them or discharge them as it suits me.
Q. If you have a common laborer and want to promote him you promote him?
A. Yes, sir.
Q. They have no relation with the general manager of the company except through you?

Counsel for the plaintiff objected to the above question as leading.

Q. What is the arrangement between them and the general manager of the company?
A. Nothing to do whatever, I run the men, and if I don't run it to suit the general manager I have to answer to him.
Q. Who employs you?
A. Well, Mr. Duncan employs me; when I took charge of the mill I was under him. I was employed with his consent.
86 Q. Who employed you?
A. Captain Mein. He recommended me to Mr. Duncan, and immediately I took charge, of course, I was under him.

Cross-examination by Mr. MALONEY:

Q. Who was superintendent over there on the 23rd of November, 1891?
A. Mr. Duncan, sir.
Q. Were you under him at that time?
A. Yes, sir.
Q. In what capacity?
A. As foreman of the mine.
Q. When did you become foreman of the mine?
A. On the 7th day of November.
Q. Did you hire Whelan here?
A. No, sir.
Q. Do you hire any of the men there?
A. Yes, sir.
Q. Were you there when Whelan was hired?
A. No, sir.
Q. You don't know whether Sam. Finley hired him or not?
A. I do not, sir.
Q. Do you know whether Sam. Finley ever hired or discharged men there?
A. No, sir; not after I was foreman.

Q. Do you know whether Sam. Finley hired or discharged men there?

A. He certainly couldn't discharge anybody; he didn't have the time.

Q. Did you ever know of him discharging a man by the name of Dan. Sullivan?

A. No, sir.

Q. You say that Sam. Finley couldn't discharge for the reason he didn't have time?

87 A. No, sir; three men keep time—Finley and two others.

Q. Do you know of his telling men to go and get their time, which is equivalent to a discharge?

A. No; if he wanted to discharge a man he reported to me.

Q. Were you present last term of court?

A. Yes, sir.

Q. Do you know a man by the name of Anderson testifying that he was discharged over there by Finley?

A. Yes, sir.

Q. Do you know anything about that?

A. No, sir; I do not know.

Q. Did you ever know of his discharging a fellow known as the Big Austrian?

A. No, sir; I never knew a man by that name.

Q. As a matter of fact, you don't know whether Finley has hired or discharged men or not?

A. No, sir.

Q. These men under Finley, from whom do they get their wages?

A. At the office.

Q. When these men went to work on the chute did you or Mr. Duncan look after their wages?

A. No, sir.

Q. Their wages came through Finley?

A. Yes, sir.

Q. You say now that mine is divided into different departments. Each department has its own boss or foreman?

A. Yes, sir.

Q. Did you take each man up and explain to him the rules of the concern over there?

A. No, sir.

88 Q. Now, when you hire a man, do you tell them the rules of that concern there?

A. No, sir.

Q. Have you got any rules posted up there to give the men notice as to what the rules are about that place?

A. No, sir.

Redirect examination:

Q. Any explanation you desire to make now do so.

A. All the explanation I wish to make is, of course, I couldn't tell any more than by implication anything about what he did before what I worked there. I exercise the same authority over the

night boss as I do anything else. If I choose to discharge him I do so, without giving any reason for my action.

ROBERT DUNCAN, called on behalf of the defendant, being first duly sworn and examined by Mr. Delaney, in chief testified as follows:

Q. Mr. Duncan, you are now the general manager of the defendant company?
A. Yes, sir.
Q. You were formerly the foreman of the mine?
A. Yes, sir.
Q. Who was the superintendent at that time?
A. Mr. Meins.
Q. You heard the testimony of Mr. Curnow?
A. Yes, sir.
Q. Is that substantially true as to the management of the property generally?
A. Yes, sir.
Q. Did Mr. Finley, while you were foreman in the mine have any authority to hire or discharge men?
A. No, sir.
Q. Who did that?
A. I did.

89 Cross-examination by Mr. MALONEY:

Q. Do you know whether he did hire men?
A. I know he did not hire men.
Q. Do you know whether he hired Whelan or not?
A. No, sir; I hired him.
Q. You swear to that?
A. Yes, sir.
Q. Do you know whether he discharged men or not?
A. Might have.
Q. Did you swear, Mr. Duncan, at the last term of court, that you hired Whelan?
A. I don't remember.
Q. Do you remember the circumstances of hiring him?
A. No, sir; I do not.
Q. As a matter of fact, you don't remember whether you hired Whelan or not; you didn't claim that you hired Whelan at the last term of court?
A. No, sir; but I should like to say that he was hired at the time I was foreman there, and I think I must have hired him.
Q. Did you ever know of him discharging a man there?
A. No, sir.
Q. Would you swear he never did?
A. No, sir.
Q. From whom did the men under Finley take their orders?
A. Those under him took their orders from him.

Q. You never went down there and gave orders what to do to the men under Finley?
A. No, sir.

The defendant having no further evidence to offer in its behalf rested.

The plaintiff, in order to rebut the evidence offered on behalf of the defendant and to further maintain the issues on his behalf, offered the following evidence in his behalf:

90 R. S. AMES, called on behalf of the plaintiff in rebuttal, being first duly sworn and examined by Mr. Maloney, testified as follows:

Q. Where were you along about the 23rd of November, 1891?
A. Working for the Treadwell Company.
Q. How long were you in the employ of the company there?
A. Sixteen months and six days.
Q. Where were you on the evening of the 23rd of November when this accident occurred?
A. I was in the dry-room at the time it occurred; I was taking cars off and running them into the mill.
Q. How long were you in the dry-room?
A. I guess I was in there about two hours.
Q. Do you know Sam. Finley, or did you know him?
A. Yes.
Q. State if you saw him that evening?
A. I did.
Q. Where did you see him?
A. I saw him in the dry-room.
Q. At what time did you see him there?
A. As near as I can tell, 10 o'clock when he came in there; I didn't pull out a watch to see, but judge as to the time.
Q. How long did he remain there?
A. To about twenty-five minutes of twelve.
Q. During that time did you stay in there most of the time?
A. Yes, I left about two or three minutes before he did.
Q. You left before he did?
A. Yes, two or three minutes, I had run a car into the mill and came out.

91 Q. From the time he came in, about 10 o'clock until about 25 minutes of 12, did he stay in there all the time?
A. Yes, sir.
Q. When did you first hear of the accident?
A. I didn't hear of it until they brought the man out of the tunnel.
Q. Where was Sam. then?
A. I couldn't say, only from hearsay.
Q. How long after the tunnel or after Sam. left the tunnel was it that you saw them bring Whelan out?
A. About two or three minutes I saw them carrying this man out.

Q. As I understand, you testified from about 10 o'clock to twenty-five minutes of 12, Sam. was in the dry-room?

A. As near as I can tell about 25 minutes to twelve.

Q. You worked there about 16 months?

A. Sixteen months and six days.

Q. Do you know of Finley hiring or discharging men?

A. I know of his discharging one man; I know of his discharging two men; one I saw and one he told me of.

Q. Was the man known as the "Big Austrian" one of them?

A. Yes, he told me of that and the other I seen him discharge, I was in the dry-room when he discharged him.

Cross-examination by Mr. DELANEY:

Q. I believe you got discharged too, didn't you?

A. Yes, sir.

Q. Who discharged you, Curnow?

A. Yes.

Q. Finley didn't discharge you?

92 A. Finley wasn't there to discharge me.

Q. Which one of these men was it that you say you saw Finley discharge?

A. I saw him discharge a man they call Charlie, I don't know his name.

Q. How long ago?

A. I couldn't tell you, along in December or January.

Q. What year?

A. '91.

Q. This accident happened in November '91, when was it in reference to that?

A. About that; December or January after that.

Q. What did the fellow say to Finley when you say you discharged him?

A. He didn't want to carry drills.

Q. What did Finley say to him?

A. He had no use for him, for him to go home.

Q. What did he do?

A. Went home.

Q. Finley give him his time?

—. ——.

Q. You don't know whether he got his time from anybody except Sam. or not?

A. No, sir, I couldn't say.

Q. Who was the man Finley told you he discharged?

A. One they call the "Big Austrian."

Q. What did he tell you about that?

A. He said he didn't want him and has discharged him.

Q. Did Finley say that he had given him his time?

A. No, sir, he said he didn't give him his time, only discharged him.

Q. Where did he go to get his pay?

A. To Corbus, I guess.

93 Q. Who gave you your time; was you told how much you were entitled to draw?

A. Curnow gave me an order to Mr. Corbus.

Q. You got the order from Curnow?

A. I went and got an order to pay to such a time.

Q. You say you worked altogether six months and six days?

A. Sixteen months.

Q. The night of the accident you were in the dry-room from 10 o'clock to twenty-five minutes of 12?

A. I was from about 10 o'clock.

Q. What time did you go to work?

A. About seven o'clock.

Q. How much of the time were you in there?

A. I couldn't say, I only handled five cars; I believe I was in here about two-thirds of the time.

Q. What time did you say you went to work?

A. Seven o'clock.

Q. Then you were from seven o'clock until midnight in the dry-room two thirds of the time?

A. Twenty after supper and five before.

Q. After supper you mean 12 o'clock supper, midnight?

A. Yes, sir.

Q. Sam. had been there about two hours with you?

A. As near as I can tell, about ten o'clock.

Q. Didn't go out at all; stayed around the dry-room?

A. Yes, sir.

Q. Stayed there all the while?

A. Yes, sir.

Q. Where did they carry him from?

A. Out of the shift.

Q. There was only five car-loads before midnight that night?

A. Yes, sir.

94 Q. How long have you known Sam. Finley?

A. I worked under him eight shifts.

Q. Do you remember who hired you?

A. Well, I will explain to you. I went over and asked for a job; I asked Mr. Duncan and he sent me to Sam. Finley; that was on Sunday the 13, and he said he was full, and I kept going until the next Sunday, and Sam. hired me and sent me to Mr. Duncan to get the order for the boarding-house.

Q. You couldn't get in on Sam.'s order?

A. No, sir; had to get an order to the boarding-house.

Q. What were you doing around the dry-room that night?

A. Keeping warm.

Q. Talk any with Sam.?

A. Yes, I talked with him.

Q. Any of the other boys there?

A. Yes, sir.

Q. How many?

A. Well, Mr. Hall was in there.

Q. Where is he now?
A. He is the engineer.
Q. This dry-room is off the engine-room, isn't it?
A. Not far.
Q. Anybody else besides Hall there?
A. I couldn't say; I don't think there was.
Q. You and Sam. were taking a kind of night off, wasn't you?
A. Yes, sir.

Redirect examination by Mr. MALONEY:

Q. You testified at the last term of court on this case?
A. Yes, sir.
Q. You were not discharged then, were you?
A. No, sir; and I wasn't discharged on account of my work either.

95 PATRICK WHELAN, recalled on behalf of the plaintiff, examined by Mr. Maloney:

Q. You heard the deposition of Finley read where he stated he called you down and he was within two or three feet of you; state if that was true?
A. No, sir.
Q. State if he called you down at all after putting you to work there that evening, or motioned to you, or anything else?
A. No, sir.
Q. Now, Whelan, you heard the witness Haggart testify he could hear the rock going into the cars; you said you were working on that chute that evening?
A. I was working on it.
Q. Could you hear any of this falling rock going into the cars?
A. No, sir.
Q. About this being jammed up, Whelan; what were you doing at the time the accident occurred?
A. I was breaking rock.
Q. Did you carry your pick and shovel and go down off the pit?
A. I was going to break a rock, and just as I lifted the hammer I went through.

Cross-examination by Mr. DELANEY:

Q. Mr. Whelan, you heard Mr. McCormick testify, didn't you?
A. Yes, sir.
Q. Do you recollect of Finley coming up and motioning to you to come down off the pile of rocks and show you where to work?
A. No, sir.
Q. Mr. McCormick is mistaken about that?
A. I never seen Finley.
96 Q. McCormick is mistaken?
A. I didn't see him motion.
Q. You didn't go down with McCormick?
A. I worked all around, I might have come down.

Q. Did you go down on the lower side of the chute with Mr. McCormick?

A. I broke rock there, probably I did go down.

Q. McCormick is mistaken?

A. He didn't motion to me.

Q. McCormick is mistaken?

A. I didn't see him motion.

Q. Did he motion at all?

A. No, sir, I didn't see him.

Q. Wasn't around there at all?

A. Well, I didn't see him there.

Q. McCormick must be mistaken if he saw him there?

A. I never exchanged a word with him.

Q. Never seen him, never heard him, he never came up on that chute at all after that; McCormick is mistaken when he says he saw motioning?

A. I never seen him.

ARCHIE MCCORMICK, called on behalf of the plaintiff, examined by Mr. Maloney, and testified as follows:

Q. How far from you was Sam. Finlay when he motioned to you to come off the chute?

A. About 60 feet.

Q. Did he say anything to you at that time?

A. He made a remark to come down and break some rock; I was nearer to him than Whelan.

97 Cross-examination by Mr. DELANEY:

Q. You say now he made a remark to come down and break some rock?

A. Yes; to break some coarse rock.

Q. You went down?

A. Yes, sir.

Q. And Whelan went down?

A. He went down a short way.

Q. What time of night was that?

A. That would be about ten o'clock.

Q. Do you recollect whether or not you heard the rock going into the train below.

A. No, sir; I never heard it.

Q. At any time?

A. No, sir; too much noise there; too many machines going.

By Mr. DELANEY: Now, if the court please, I desire to ask the witness this question: If, after the accident, at the boarding-house he didn't state to Mr. Collins in answer to a question from Collins asked him as to how the accident happened that he couldn't understand it; that he didn't see how Whelan got in there, as Finley had ordered him, Whelan and this witness to come down off the chute?

Counsel for the plaintiff objected to counsel for the defendant asking the question which he has just stated on the grounds and for the reason that the same is not proper cross-examination.

By the COURT: This witness was introduced here as a witness for the defense; he was examined on his direct examination and then turned over to the plaintiff for cross-examination; the plaintiff examined him, and he was told to get off the stand. Now the
98 plaintiff calls him back here, and in that way makes him his witness for this particular purpose; he asked him now what was said up there by Finley, and now you ask him whether he didn't make some statement which would be contradictory *that* that at another time.

By Mr. DELANEY: The question covers the same evening, but after the accident happened; locating the time and place, the boarding-house; if he didn't make the statement asked him.

By the COURT: I think you can do that; it would tend to dispute that, I think; he can answer the question.

Counsel for the plaintiff then and there duly excepted to the ruling of the court.

A. No, I didn't make any such remark.

The plaintiff having no further evidence to offer in rebuttal rested.

Thereupon the defendant, in order to rebut some parts of the evidence of plaintiff's rebuttal:

WILLIAM COLLINS, called on behalf of the defendant in rebuttal, being first duly sworn and examined by Mr. Delaney, testified as follows:

Q. Do you know the last witness, Archie McCormick?

A. Yes, sir.

Q. Were you at the boarding-house of the Treadwell mill when Whelan got hurt?

A. Yes, sir.

Q. Did you have any conversation with McCormick immediately after the accident at the boarding-house?

A. Not quite immediately after the accident.

Q. The same night?

A. Yes, sir.

Q. State what it was.

99 A. I asked Archie how he got hurt, and he said he went through the shaft; I asked him how, was he standing on top, and he said yes, Sam. warned us; he said, I came down and brought my tools, but Whelan still stayed up there, and the next thing I saw he went out of sight and the only way to get him out was to run him through the chute.

Cross-examination by Mr. MALONEY:

Q. You remember that pretty distinctly? You camp with the Treadwell people, do you not?

A. Yes, sir.

Q. You say that Archie told you that he himself came down off the chute?

A. Yes, sir.

Q. Whelan stayed there?

A. He said Whelan was on the chute.

Q. He said Sam. told Whelan to come down?

A. He said Sam. told him. He said I came down and brought my tools and went back for a torch and Whelan still stayed there, is the way he told me. He said I don't know what Whelan was doing there.

Q. You testified at the last term of the court on this case?

A. I did.

Q. Did he mention Whelan's name with that notice to come down?

A. He didn't say.

Q. Didn't mention Whelan's name?

A. No, sir. In giving me the account of the accident that is the way he mentioned it to me.

Counsel for the defendant announced that he had no further evidence to offer in rebuttal and therefore rested his case in rebuttal.

By Mr. DELANEY: Now I desire to ask the court to make
100 the following motion. The defendant now moves the court to direct a verdict for the defendant on the grounds: First. That it appears from the testimony that the negligence, if any, which caused the accident to the plaintiff and the consequent injuries are the result of the negligence of a co-employee, or fellow-workman, Sam. Finley, for which the defendant is not liable.

Second. That it appears from the testimony that the plaintiff contributed to the accident himself by carelessly and negligently walking over the top or mouth of the chute after he had warning that rock was to be drawn from there.

By the COURT: The first proposition involves the same question that I passed upon the motion made before the introduction of the defendant's evidence. As to the second proposition, I think that is a question of evidence as to the contributory negligence that ought to be left to the jury and I will therefore overrule the motion.

Counsel for the defendant then and there duly excepted to the ruling of the court.

Counsel for defendant then requested the court to direct the jury to find a special verdict upon the issues herein and to find upon particular questions of fact to be stated in writing.

The court refused to so direct the jury; to which ruling counsel for defendant then and there excepted.

Counsel for defendant then requested the court to give to the jury the following instructions:

2d. "To make the defendant liable in this case for the injury received by the plaintiff, the evidence must satisfy you that
101 the defendant was guilty of negligence causing the injury to plaintiff, and if you find from the evidence that the com-

pany, by its general manager or by the superintendent of the mine under him, directed any one of the employés or workmen of defendant to notify the men working about the chute in the pit whenever rock was to be drawn from the chute into the train and *and* that this was a standing rule of the defendant company, then your verdict must be for the defendant, whether such employee gave the notice and carried out the rule or not, as in that case the negligence of such employee in not giving the notice would not be the negligence of the defendant."

(Here the court modified said request by inserting the words "unless you also find from the evidence that the defendant was guilty of gross negligence in employing as such workmen or employees unsuitable, unskilled and unreliable persons.")

The court refused to give the said instructions except as so modified and did give the same as modified, to which refusal and modified instructions defendant then and there excepted.

Counsel for defendant then requested the court to instruct the jury as follows:

3d. "The master is never liable for injuries received by a workman in his employ if the injuries were the result of any negligence on the part of the person injured. This is what the law calls contributory negligence; and if you find from the evidence that the accident which caused the plaintiff's injuries was in any manner the result of a want of ordinary care on the part of the plaintiff to avoid the accident and escape the danger the plaintiff cannot
102 recover and your verdict must be for the defendant." (Here the court modified such request by inserting the words "unless you also find from the evidence that the defendant was guilty of gross negligence and plaintiff's negligence was slight.")

The court refused to give the said instructions except as modified, to which refusal defendant then and there excepted.

Counsel for defendant then requested the court to instruct the jury as follows:

4th. "If you find from the evidence that any portion of the rock had been drawn from chute 17 before the accident happened; and that a bridge had formed over the top of the chute, with a hollow underneath by the lower rock having been drawn out; and that over the mouth of the chute having become bound or lodged so as to form a shell over the top, and that while plaintiff was upon the same it broke and caved in, drawing plaintiff into the chute, whereby he received the injuries complained of, the plaintiff cannot recover, as such a condition was no fault of the defendant."

The court refused to instruct the jury, to which ruling or refusal the counsel for defendant then and there excepted.

Counsel for defendant then requested the court to instruct the jury as follows:

5th. "If you should find that Finley's negligence contributed to the accident then unless you also find that defendant neglected to use ordinary care in the selection of Finley, it is not liable."

The court refused to give such instructions, except as
103 modified by adding the following words, viz.: "Unless you

also find Finley was a vice-principal or agent of the company," and thereupon gave such instructions as modified.

To which refusal and instructions counsel for defendant then and there excepted.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: In delivering its charge, the court is required to state to you all matters of law which it thinks necessary for your information in giving your verdict, but it cannot present the facts of the case, for you are the exclusive judges of all questions of fact. Nevertheless, you must receive as law what is laid down as such by the court.

You may, after hearing the charge, either decide in the jury-box or retire for deliberation; and after you have retired for deliberation if you desire to be informed on any point of law arising in the case, you may require the officer having you in charge to conduct you into court, when the information will be given to you.

While you are absent deliberating on your verdict, although the court may adjourn from time to time in respect to other business, it is nevertheless open for every purpose connected with this case until your verdict is rendered or you are discharged.

When you have agreed upon your verdict you will be conducted into court by the officer having you in charge.

Your verdict must be in writing, and the proper blank forms to be used will be furnished to you.

You are instructed generally that you are the judges of the
104 effect or value of evidence, but your judgment is not arbitrary and must be exercised with legal discretion and in subordination to the rules of evidence.

The issues in a case are made and presented for trial by the pleadings. In this case the complaint alleges that the plaintiff on a certain day, while engaged as a laborer in defendant's mine at Douglas island in this district, was severely and permanently injured by being drawn down through the chute from the ore pit when the draw in the tunnel below was opened to load the cars used in conveying the ore to the mill, and that this accident was caused without negligence on the part of plaintiff, but by the negligence of defendant. The answers admits that the accident occurred, but denies that plaintiff was injured so severely as charged or that his injuries were or are of a permanent character. It also sets up allegations explaining how the accident occurred; that the defendant was not guilty of any negligence in the matter, and charging what is termed contributory negligence on the part of plaintiff as the cause of his said injuries. These are substantially the issues to be tried and determined by you now. The defendant is a corporation, and therefore could not be there physically, and, if liable at all, the liability comes from its being represented by some person who at the time had power and authority under the law to represent and bind it by his acts or omissions, and that through the negligence or want of skill of this person this plaintiff was injured through no

fault of his own or negligence on his part contributing to the injury.

If you believe from the evidence that the person who was in charge of the pit when plaintiff was at work at the time of
105 the accident was only a fellow-servant or colaborer, then if this person was guilty of negligence in not notifying plaintiff of the intention to make the draw of ore it is only the negligence of a fellow-servant and the defendant cannot be held liable, for when a laborer accepts employment in a certain position for a definite fixed price for his services he assumes all the ordinary risks and hazards of that position, including the negligence of his colaborers there.

If you find from the evidence that the defendant company had an established rule which required due notice to be given to the workmen in the pits each time before the draw of the ore into the cars below was made, and this notice was not given through the negligence of plaintiff's colaborer, then the defendant is not liable unless you also find that the defendant was guilty of negligence in employing as such colaborer an unsuitable, unskilled and unreliable person.

Whether the defendant company had any such rules or not, if Finley or any other person notified plaintiff in any way that they were going to open the draw below, or if he took plaintiff away from the opening of the pit and put him in another place to work, and plaintiff, after being so notified or taken to another place to work, stayed at or near the mouth or draw of the pit or returned there on his own account and was then injured, he was guilty of carelessness or negligence, and the defendant is not liable.

An employee, when he voluntarily enters into a contract of services to do a specified work for a certain compensation thereby accepts the ordinary risks and perils incident to doing the work, in-
106 cluding those arising from the negligence of his fellow-servants; but it is the duty of his employer to provide a reasonably safe place to work, to supply reasonably safe machinery or other instruments for use of his servants, and make such rules and regulations as ordinary care and prudence would require for their safety at their work.

In this kind of a case the burden of proof of the allegations of the complaint is upon the plaintiff, and he must satisfy you by a preponderance of the testimony of the material allegations thereof before you can find for him in any sum.

A person or a corporation engaged in business is not liable for every injury received by persons in their employment. If this was not so, then it would be entirely too hazardous for any responsible person or corporation to engage in business requiring servants or employees. A man who engages in business for himself assumes the risk of the business, and an employer is only required to furnish reasonable safe machinery and make reasonable rules and regulations to insure the safety of his employees.

If you believe from the evidence that Finley took or motioned the plaintiff away from the chute where the accident happened, to

make a draw, and then the plaintiff voluntarily went back near the chute and was then drawn through it and injured the defendant company is not liable, for if he went back then without orders and voluntarily, he was guilty of contributory neglect in going back after being ordered away. The mine or pit boss would not be required to stay there and prevent him from going back to the chute.

107 The burden of proof to establish contributory negligence by plaintiff is upon the defendant; that is, the burden of proof is changed here, for while the plaintiff in order to recover must prove injury occasioned by the negligence of the defendant by a preponderance of evidence, yet his right to recover may be defeated by proof on the part of the defendant that the plaintiff by his own fault and negligence contributed to bringing about the injury complained of, but such fault or negligence must be established by the preponderance of evidence.

The terms neglect, negligence, negligent and negligently, when so employed, *e*mport a want of such attention to the nature or probable consequences of the act or omission referred to as a prudent man ordinarily bestows in acting in his own concerns.

In this case the plaintiff alleges negligence on the part of the defendant through its servants, and before he can recover he must prove the negligence by a preponderance of the evidence.

You are instructed that the plaintiff was bound to exercise all reasonable care and prudence in pursuing his labors for the defendant, for if you believe from the evidence that he did not exercise such reasonable care and prudence, but for want thereof contributed directly to the injury complained of, then you cannot find for him unless you also find from the evidence that defendant was guilty of gross negligence and plaintiff's negligence was slight.

If you find for the plaintiff you may bring in a verdict for any sum which from the evidence you agree upon from the
108 smallest sum up to the amount claimed in the complaint, but if you find for the defendant your verdict must be a general one for him. The proper forms for each side will be given to you.

The court also instructed the jury at the request of the plaintiff as follows:

1st. "The jury is instructed that the true test is whether the person in question is employed to do any of the duties of the master; if so he cannot be regarded as the fellow-servant, but is the representative of the master, and any negligence on his part is the performance of the duty thus delegated to him must be regarded as the negligence of the master."

To which instructions the court of its own motion added the words following:

"You have heard the testimony as to Findlay's authority and duties, and whether or not he had any power to employ men or discharge them, or whether he simply acted under another man who had the same power over him that was exercised over other laborers."

The court at the request of the plaintiff further instructed the jury as follows:

2d. "The jury are instructed that the defendant having alleged contributory negligence on the part of the plaintiff, it must be established by a preponderance of evidence to warrant the jury in finding for the defendant."

The court at the request of plaintiff further instructed the jury as follows:

"The jury are instructed that the plaintiff's contributory negligence cannot exonerate defendant and bar plaintiff's recovery when the defendant might by the exercise of reasonable care and prudence have avoided the consequence."

109 The jury thereupon retired in charge of the bailiff, and returned with the following verdict:

(Title of Court and Cause.)

We, the jury in the above-entitled cause, duly impaneled and sworn, find for the plaintiff, and assess his damage at ($2,950.00) two thousand nine hundred and fifty dollars.

ANDREW P. KASHEVAROFF, *Foreman.*

To which verdict the counsel for defendant then and there excepted on the grounds that the damages were excessive; that it appeared to have been given under the influence of passion and prejudice; and that the evidence was insufficient to justify it.

Thereafter and within the time allowed by law counsel for defendant filed and served its notice of motion for a new trial as follows:

In the United States District Court, District of Alaska.

PATRICK WHELAN, Plaintiff,
vs.
THE ALASKA TREADWELL GOLD MINING COMPANY, Defendant.

To the plaintiff and John F. Maloney, Esq., his counsel:

Take notice that at the opening of the court at two o'clock in the afternoon of this day, or as soon thereafter as counsel can be heard, at the court-room of the court of Juneau, the defendant will

110 move that the verdict rendered herein be set aside and a new trial granted for the following causes materially affecting the substantial rights of the defendant.

1st. Excessive damages appearing to have been given under the influence of passion or prejudice.

2nd. Insufficiency of the evidence to justify the verdict.

3rd. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be based upon the pleadings, papers and records

herein, and upon a bill of exceptions to be hereafter prepared and filed.

Dated Juneau, June 17th, 1893.

A. K. DELANEY,
JOHN S. BUGBEE,
JOHN G. HEID,
Attorneys for Defendant.

And because the matters and causes alleged for granting said motion do not appear of record herein the defendant has within the time allowed by law prepared this his statement and bill of exceptions on such motion for new trial as well as on appeal from such verdict if such appeal be taken and specifies as errors in law occurring at the trial:

1st. Error of the court in denying defendant's motion for a nonsuit.

2d. Error of the court in refusing to direct a verdict for defendant.

3d. Error of the court in refusing to direct the jury to find a special verdict.

111 3d. ½. Error of the court in refusing to give the instructions requested by defendant marked 2d except as modified.

4th. Error of the court in giving such instructions as modified.

5th. Error of the court in refusing to give the instructions requested by defendant and marked 3d except as modified.

6th. Error of the court in giving such instructions as modified.

7th. Error of court in refusing to give the instruction requested by defendant and marked 4th.

8th. Error of the court in refusing to give the instruction requested by defendant and marked 5th except as modified.

9th. Error of the court in giving such instruction as modified.

And defendant requests that this statement and bill of exception be settled and allowed.

Juneau, June 24, 1893.

A. K. DELANEY,
JOHN S. BUGBEE,
JOHN G. HEID,
Att'ys for Def't.

The foregoing statement and bill of exceptions is hereby agreed to, and may be settled and allowed.

Dated Juneau, August 8, 1893.

J. F. MALONEY,
Att'y for Pl'ff.
JOHN S. BUGBEE,
Att'y for Def't.

112 In accordance with the facts and the foregoing stipulation, this statement and bill of exceptions is approved and allowed.

Dated, Sitka, Sept. 8th, 1893.

WARREN TRUITT,
U. S. Dist. Judge.

(Endorsed:) No. 319. United States dist. ct., dist. of Alaska. Patrick Whelan *vs.* Alaska Treadwell G. M. Co. Def't's statement & bill of exceptions on motion for new trial. Filed Sept. 8, 1893. N. R. Peckinpaugh, clerk.

And afterwards, to wit, on the 5th day of December, 1893, the defendant, by its attorneys, filed in said cause its petition for writ of error, assignment of errors and order for writ of error, which are in words and figures following, to wit:

Petition.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN, Defendant in Error.

To Honorable Joseph McKenna, judge:

The petitioner, The Alaska Treadwell Gold Mining Com-
113 pany, a corporation, states that there is pending in the United States district court of Alaska an action at law, wherein the petitioner, plaintiff in error herein, is defendant and the said Patrick Whelan, defendant in error, is plaintiff.

That heretofore, to wit, on the 11th day of July, 1893, a judgment was duly made and entered in said action in favor of the said plaintiff therein and against said defendant for the sum of $2,950.00 damages and $76.55 costs.

That the petitioner, the said defendant, feels itself aggrieved by the said judgment, and now comes by its attorney, T. Z. Blakeman, and petitions for an order allowing it a writ of error from the said judgment of the United States district court to the honorable United States circuit court of appeals for the ninth circuit, sitting at the city of San Francisco, State of California, and according to the laws of the United States in that behalf made and provided.

That the petitioner desires to stay process on said judgment. That said plaintiff, Patrick Whelan, is a laboring man without any property that is not exempt from execution, and is liable to move about from place to place; that heretofore, to wit, on the — day of July, 1893, petitioner instituted proceedings in said district court in and for the district of Alaska, to have said judgment reviewed by appeal to this court; that upon the giving of notice of appeal, petitioner executed and lodged in said district court an appeal bond with two sureties in the sum of $3,500.00, which said bond was approved by said district court and was intended to stay process on said judgment; that petitioner has been advised that an appeal may not lie in such cases.

114 Wherefore petitioner prays that an order also be made fixing the amount of bond and number of sureties that petitioner shall furnish upon said writ of error, and that the bond,

when given as required by the order, shall stay process on said judgment.

And your petitioner will ever pray, etc.

Nov. 21st, 1893.

T. Z. BLAKEMAN,
Attorney for Petitioner.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE ALASKA TREADWELL GOLD MINING COMPANY, a Corporation, Plaintiff in Error,
vs.
PATRICK WHELAN, Defendant in Error.

Assignment of Errors.

The plaintiff in error presents with his petition for writ of error the following assignment of errors:

The plaintiff in error says that in the record and proceedings in that certain action sought to have reviewed on writ of error herein, to wit, that action pending in the United States district court for the district of Alaska, wherein Patrick Whelan is plaintiff and the said Alaska Treadwell Gold Mining Company is defendant, there is manifest error in this, to wit:

1. That facts stated in the complaint in said action are not sufficient to constitute a cause of action.

115 2. That the judgment is against law.

3. That the evidence is insufficient to justify or sustain the verdict.

4. That the court erred in denying defendant's motion for nonsuit.

5. That the court erred in refusing to direct the jury to find a verdict for the defendant on the ground requested, to wit: 1. That the negligence, if any, which caused the injury, was the negligence of a co-employee of plaintiff, to wit, Sam. Finley; 2. That the plaintiff contributed to the accident himself by carelessly and negligently walking over the top or mouth of chutes after he had warning that rock was to be drawn from them.

6. The court erred in refusing to instruct the jury at the request of defendant to find a special verdict.

7. That the court erred in denying defendant's motion for a new trial.

8. The court erred in refusing to give the following instruction to the jury requested by defendant, marked 2, to wit: "To make the defendant liable in this case for the injury received by the plaintiff the evidence must satisfy you that the defendant was guilty of negligence causing the injury to plaintiff, and if you find from the evidence that the company, by its general manager or by its superintendent of the men under him, directed any one of the employees or workmen of defendant to notify the men working about the chutes in the pit whenever rock was to be drawn from the chutes

into the train, and that this was a standing rule of the defendant company, then your verdict must be for the defendant, whether such employee gave the notice and carried out the rule or
116 not, as in that case the negligence of such employee in not giving the notice would not be the negligence of the defendant."

The court also erred in modifying said instructions and giving the same as modified. The modification consisted in adding to said instructions as follows, to wit: "Unless you also find from the evidence that the defendant was guilty of gross negligence in employing as such workmen or employees unskilled and unreliable persons." To the giving of said instructions as modified the defendant excepted.

9. The court erred in refusing to give to the jury the following instruction requested by defendant, marked 3, to wit:

"The master is never liable for injuries received by a workman in its employ if the injuries are the result of any negligence on the part of the person injured. That is what the law calls contributory negligence, and if you find from the evidence that the accident which caused the plaintiff's injuries was in any manner the result of want of ordinary care on the part of the plaintiff to avoid the accident and escape the damage, the plaintiff cannot recover and your verdict must be for the defendant."

The court modified such instruction by adding thereto the following words, to wit: "Unless you also find from the evidence that the defendant was guilty of gross negligence and the plaintiff's negligence was slight," and gave the same as modified against the objection of the defendant, and thereby the court erred.

10. The court erred in refusing to give the following in-
117 struction, marked "4" and requested by the defendant, to wit:

"If you find from the evidence that any portion of the rock had been drawn from the chute 17 before the accident happened and that a bridge had formed over the top of the chute, with a hollow underneath, by the lower rock having been drawn out, and that over the mouth of the chute the rock having become bound or lodged so as to form a shell over the top, and that while the plaintiff was upon the same it broke and caved in, drawing plaintiff into the chute, whereby he received the injuries complained of, the plaintiff cannot recover, as such a condition was no fault of defendant.

T. Z. BLAKEMAN,
Attorney for Plaintiff in Error.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN, Defendant in Error.

On reading the petition annexed hereto, and on motion of T. Z. Blakeman, Esq., attorney for the plaintiff in error, it is hereby ordered that a writ of error to the United States circuit court
118 of appeals for the ninth circuit from the judgment heretofore, to wit, July 11th, 1893, made and entered in the United States district court for the district of Alaska in favor of said Patrick Whelan and against said Alaska Treadwell Gold Mining Company in an action therein pending wherein said Patrick Whelan is plaintiff and said Alaska Treadwell Gold Mining Company is defendant be and the same is hereby allowed, and that a certified transcript of the record therein be forthwith transmitted to the United States circuit court of appeals for the ninth circuit upon a bond being made and approved by a judge of this court in the sum of $3,500.00, with two sureties, conditioned that the said Alaska Treadwell Gold Mining Company shall prosecute its writ of error to effect, and if it fail to make good its plea shall answer to said Patrick Whelan for all damages and costs, which said bond when approved shall operate to stay all process on said judgment until said writ of error be determined.

Dated San Francisco, California, Nov. 21st, 1893.

J. McKENNA, *Judge.*

(Endorsed:) United States district court for the district of Alaska. Patrick Whelan, plaintiff, *vs.* Alaska Treadwell G. M. Co., defendant. Petition for writ of error. Assignment of errors and order for writ of error. Filed December 5, 1893. N. R. Peckinpaugh, clerk.

And on said 5th day of December, 1893, the defendant, by its attorney, also filed in said court in said cause a writ of error, which is in words and figures following to wit:

119 (*Writ of Error.*)

UNITED STATES OF AMERICA *ss.*:

The President of the United States to the honorable the judge of the district court of the United States for the district of Alaska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said district court before you, or some one of you, between The Alaska Treadwell Gold Mining Company, plaintiff in error, and Patrick Whelan, defendant in error, a manifest error hath happened, to the great damage of the

said Alaska Treadwell Gold Mining Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 21st day of December next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
120 the Supreme Court of the United States, the 21st day of November, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by—
J. McKENNA, *Judge.*

(Endorsed:) No. —. United States circuit court of appeals for the ninth circuit. Alaska Treadwell Gold Mining Co., plaintiff in error, *vs.* Patrick Whelan, defendant in error. Writ of error. Filed December 5, 1893. N. R. Peckinpaugh, clerk.

And on said 5th day of December, 1893, said defendant by its attorney also filed in said court in said cause its bond on writ of error, which is in words and figures following, to wit:

(*Bond.*)

Know all men by these presents: That we, The Alaska Treadwell Gold Mining Company as principal and William Alvord and A. T. Corbus as sureties are held and firmly bound unto Patrick Whelan in the full and just sum of thirty-five hundred dollars, to be paid to the said Patrick Whelan, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of November, in the year of our Lord one thousand eight hundred and ninety-three.

121 Whereas, lately at a district court of the United States for the district of Alaska in a suit pending in said court between Patrick Whelan, plaintiff, and The Alaska Treadwell Gold Mining Company, defendant, a judgment was rendered against the said defendant, and the said Alaska Treadwell Gold Mining Company

having obtained from the United States circuit court of appeals for the ninth circuit a writ of error to reverse the judgment in the aforesaid suit and a citation directed to the said Patrick Whelan citing and admonishing him to be and appear at a United States circuit court of appeals for the ninth circuit to be holden at San Francisco, in the State of California, on the 21st day of December next.

Now the condition of the above obligation is such that if the said Alaska Treadwell Gold Mining Company shall prosecute said writ of error to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ALASKA TREADWELL GOLD MINING COMPANY,
P'r A. T. CORBUS, *Sec'y.* [SEAL.]
WILLIAM ALVORD. [SEAL.]
A. T. CORBUS. [SEAL.]

Acknowledged before me this day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California, Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

122 UNITED STATES OF AMERICA, } *ss:*
Northern District of California, }

William Alvord and A. T. Corbus, being duly sworn, each for himself, deposes and says he is a householder in said district, and is worth the sum of thirty-five hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

WILLIAM ALVORD.
A. T. CORBUS.

Subscribed and sworn to before me this 22nd day of Nov., A. D. 1893.

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California, Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

The above bond is hereby approved this 5th day of December, 1893.

WARREN TRUITT,
U. S. Dist. Judge.

(Endorsed:) No. —. United States circuit court of appeals for the ninth circuit. Alaska Treadwell Gold Mining Company, plaintiff in error, *vs.* Patrick Whelan. Bond on writ of error. Form of bond and sufficiency of securities, approved Nov. 23d, 1893. J. McKenna, judge. Filed December 5, 1893. N. R. Peckinpaugh, clerk.

And on said 4th day of December, 1893, said defendant, by its attorney, also filed in said court in said cause a citation, which is in words and figures following, to wit:

123 *Citation.*

THE UNITED STATES OF AMERICA, *ss*:

The President of the United States to Patrick Whelan, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 21st day of December next, pursuant to a writ of error in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Alaska Treadwell Gold Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, of the United States circuit court of appeals for the ninth circuit, this 21st day of November, A. D. 1893.

J. McKENNA, *Judge.*

Due service of within citation made this 3d day of Dec., 1893.

J. F. MALONEY,
Def't in Error.

(Endorsed:) No. —. U. S. circuit court of appeals for the ninth circuit. Alaska Treadwell Gold Mining Company, plaintiff in error, *vs.* Patrick Whelan, defendant in error. Citation. Filed December 5, 1893. N. R. Peckinpaugh, clerk.

124 THE UNITED STATES OF AMERICA, } *ss*:
District of Alaska, }

I, N. R. Peckinpaugh, clerk of the district court of the United States, in and for the district of Alaska, do hereby certify that the above and foregoing, consisting of 126 pages, is a true and complete transcript of the record, pleadings and proceedings in case No. 319, of John Whelan, plaintiff, against The Alaska Treadwell Gold Mining Company, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court in the city of Sitka, in said district, this 14 day of December, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.]

N. R. PECKINPAUGH,
Clerk U. S. District Court.

(Endorsed:) No. 161. Transcript of record. United States circuit court of appeals, ninth circuit. October term, 1893. Alaska Treadwell Gold Mining Co., plaintiff in error, *vs.* Patrick Whelan, defendant in error. Error to district court of the U. S., district of Alaska. Filed December 30, 1893. F. D. Monckton, clerk.

125 United States Circuit Court of Appeals, Ninth Circuit.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN, Defendant in Error.

In error to the district court of the United States for the district of Alaska.

T. Z. Blakeman, for plaintiff in error; Lorenzo S. B. Sawyer, for defendant in error.

Before McKenna and Gilbert, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

126 This is an action to recover damages for injuries received by the negligence of the defendant (plaintiff in error).

The complaint alleges that plaintiff (defendant in error) on the 23d day of November, 1891, while in the employ of defendant as a laborer at its mine at Douglass island, in Alaska, was severely and permanently injured by being drawn through the chute from the ore pit when the draw in the tunnel below was opened to load the cars used in conveying the ore to the mill; that this accident occurred, without any negligence on his part, by the negligence of defendant. The answer admits that the accident occurred, but denies that plaintiff was injured to the extent charged, or that his injury was caused by the negligence of defendant, and alleges that plaintiff was guilty of contributory negligence.

Upon these issues the cause was tried before a jury, which resulted in a verdict in favor of plaintiff for $2,950.00.

There was but one witness introduced on behalf of plaintiff—the plaintiff himself.

The defendant owned a mill, mine, and chlorination works. It had a general manager. It also had a superintendent or foreman in charge of each of its works. It had three shifts of workmen engaged at labor in the mine—two in the daytime and one at night. Each shift had separate bosses. A man named Finley was the shift boss at night, and upon this shift the plaintiff was at work when the injury was received. The plaintiff's duty was to break rock and get it ready to go through the chutes to be loaded into cars for conveyance to the mill. He had been employed at that work for about six months prior to the accident. In a place designated
127 as the "pit" the quartz rock blasted from the lodes was thrown where it was broken into pieces and made ready for the mill.

From this pit several chutes led downward into a tunnel, where there was a railroad track leading out to the mill and on which cars were run to receive the broken rock from the chutes. The lower end of the chutes, which were several feet below the floor of the pit, had gates to be opened when the rock was to be drawn from the chutes into the cars. Plaintiff and one McCormick were working in chute No. 17, which was full of broken rock and the rock was piled over it about thirty feet deep. On the top of this pile were large pieces of rock which, on the night the accident occurred, the plaintiff and McCormick were directed by Finley to break. It was Finley's duty to direct when the rock from any particular chute was to be drawn. It was his custom to go into the pit and notify the men when he was going to draw from the chute. There is a conflict in the evidence as to whether Finley came back that night after ordering the men to break the rock. The plaintiff testified that he did not. The jury must have found that he did not, or, if he did, that plaintiff did not see or hear him. Within an hour after plaintiff commenced work under Finley's orders chute No. 17 was drawn and plaintiff went through with the rock and was injured.

1. At the close of the evidence the defendant moved the court to direct the jury to return a verdict for defendant upon the following grounds:

"First. That it appears from the testimony that the negligence, if any, which caused the accident to the plaintiff and the con-
128 sequent injuries are the result of the negligence of a co-employé or fellow-workman, Sam. Finley, for which the defendant is not liable.

Second. That it appears from the testimony that the plaintiff contributed to the accident himself by carelessly and negligently walking over the top or mouth of the chute after he had warning that rock was to be drawn from there?"

The court overruled the motion.

Did the court err in refusing to instruct the jury to find a verdict for the defendant?

The first and most important question is whether Finley, the night boss of the shift of workmen employed at the mine, was a fellow-servant of the plaintiff. Finley's duties were to see that the men did their work, to direct them where to work, and to notify them when rock was to be drawn from the chutes. It was the duty of plaintiff to obey Finley's orders. Finley was his boss.

These questions are undisputed. There was a conflict in the testimony as to whether Finley was authorized to employ and discharge men at work under him or whether he had done so. Plaintiff testified that Finley employed him and he knew that Finley had discharged other men. Upon this state of the evidence the court submitted the question, as a question of fact, to the jury as to whether or not Finley was a fellow-servant by the following instruction: "The jury is instructed that the true test is whether the person in question is employed to do any of the duties of the master. If so, he cannot be regarded as the fellow-servant, but is the representative of the master, and any negligence on his part in the per-

formance of the duty thus delegated to him must be regarded
129 as the negligence of the master. You have heard the testimony as to Finley's authority and duties and whether or not he had any power to employ men or discharge them or whether he simply acted under another man, who had the same power over him that was exercised over other laborers."

We do not deem it necessary to discuss the various definitions of the general rules upon this subject, nor to review the conflicting decisions which prevail in the different State courts in regard thereto. The instruction given by the court, which was not objected to, is within the principles announced by the Supreme Court of the United States as the governing rule in determining whether or not, in any given case, the injury was caused by the acts of a fellow-servant. Railroad Co. *v.* Baugh, 149 U. S., 369; by the circuit court of appeals in Louisville & N. R. Co. *v.* Ward, 61 Fed., 927, and by this court in Northern P. R. R. *v.* Charless, 51 Fed., 562.

It is true that Finley and the plaintiff were employed and paid by the same master and were occasionally brought together in the same common employment. "But it is by no means true that all persons who are in the employ of [a common master are fellow-servants of each other, in the sense that one of them is not entitled to recover from the common master for injuries caused by the negligence of another employee. Ever since the rule first announciated in Priestly *v.* Fowler was sent upon its devious way there has not been a court in England or in this country that has maintained the contrary. All the labor of the courts since the rule was established at the outset has been in determining its principal limitations. * * *
130 The true test, it is believed, whether an employee occupies the position of a fellow-servant to another employee or is the representative of the master is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant by which another employee is injured, or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master. The master as such is required to perform certain duties, and the person who discharges any of these duties, no matter what his rank or grade, no matter by what name he may be designated, cannot be a servant within the meaning of the rule under discussion." McKinley on Fellow-servants, section 23.

The defendant is not released from liability from the fact that there were superior agents standing between Finley and the corporation who had control and supervision over his acts.

The Supreme Court of the United States has repeatedly declared that a master, in employing a servant, impliedly engages with him that the place in which he is to work and the tools and machinery which is furnished him, or the instrumentalities by which he is surrounded, shall be reasonably safe, and that a failure to discharge this duty exposes the master to liability for injury caused thereby to the servant; that it is wholly immaterial how or by whom the master discharged that duty, and that the master's liability is not

made to depend in any manner upon the grade of service of a co-employee, but upon the character of the act itself and a breach of the positive obligation of the master.

131 Hough *v.* Railway Co., 100 U. S., 213; Northern P. R. R. Co. *v.* Herbert, 116 U. S., 642; Baltimore & O. R. R. Co. *v.* Baugh, 149 U. S., 368; Union Pac. R. R. Co. *v.* Daniels, 152 U. S., 684.

These general principles have been universally followed by this court. Railroad Co. *v.* Charless, 51 Fed., 562; Southern Pacific Co. *v.* Lafferty, 57 Fed., 536; Union Pacific Co. *v.* Novak, 61 Fed., 582.

It was the master's duty in the present case to provide a reasonably safe place for its employés to work, to keep the chutes through which the quartz rock was drawn in reasonably good condition and repair, to employ competent persons in the management thereof, and to notify the workmen engaged in breaking rock in the pit when the rock in the chute would be drawn. This latter duty it delegated to the night boss, Finley. Plaintiff by his contract of service did not assume the risk that this duty would not be performed.

In Louisville & N. R. Co. *v.* Ward, *supra*, the court of appeals, in discussing a similar question, said: "It is not material, therefore, that the switchman, who in this instance was injured, and the track-repairers, whose negligence caused the injury, worked in the same yard and for the same general purpose of maintaining and operating the railroad of the common employer. It was a duty which under implied contract the railroad company owed to the switchman to keep the yard and tracks where he was employed to do his work—hazardous enough under the most favorable conditions—in a reasonably safe condition; and if the trackmen to whom the discharge of that duty was intrusted negligently left in the track and between the ties, which they had recently been ballasting, a
132 dangerous hole which caused the injury complained of, their negligence was attributable to the plaintiff in error, and the case was properly submitted to the jury without reference to the question of responsibility for injuries caused by fellow-servants."

The present case is distinguishable in some of its facts from Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S., 484, upon which defendant principally relies. There the court held that a brakeman working a switch for his train was a fellow-servant with the engineer of another train, because, among things, "neither works under the orders or control of the other." Here it is undisputed that the plaintiff did work under the control of Finley, and was at all times subject to his orders. Although the question whether or not Finley employed and discharged workmen that were under his control might not of itself be conclusive under the test laid down by the court, it was an important factor in determining whether or not he was a fellow-servant with the plaintiff or the vice-principal of the defendant. Ordinarily, the question whether the servant whose negligence caused the injury is a fellow-servant with the injured person is a question of law; yet, under all the facts of this

case and the law applicable thereto, it is made clear that the court did not err in submitting it to the jury. It was the duty of the court to declare the law and give the rule as to the definition of fellow-servants as applicable to the facts, and for the jury to determine whether under the facts the case came within the definition. Especially is this true in all cases where as here there was a conflict in the evidence as to some of the essential facts.

133 "The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." Texas Railway Co. *v.* Cox, 145 U. S., 606, and authorities there cited.

The court did not err in submitting the question of contributory negligence to the jury. This, perhaps, sufficiently appears from what has already been said upon the other branch of the motion, and but little need be added upon this point.

It was the duty of the jury in determining this question to consider the surroundings in which the plaintiff was placed; the noise of the drills near where he was at work; the fact that the top of the chute was completely covered over with rock to such a depth that it was difficult, if not impossible, to tell where it was. Moreover, the mere fact that there was a conflict of evidence as to whether Finley notified the plaintiff when the rock was to be drawn from the chute made it the duty of the court, under proper instructions, to submit this question to the jury.

Kane *v.* Northern C. R. Co., 128 U. S., 91; Jones *v.* East Tennessee R. Co., 128 U. S., 443; Washington R. R. Co. *v.* McDade, 135 U. S., 571; Railway Co. *v.* Converse, 139 U. S., 469; Railway Co. *v.* Ives, 144 U. S., 409; Northern P. R. R. Co. *v.* Amato, 144 U. S., 467; Union P. R. R. Co. *v.* Jarvi, 53 Fed., 70.

2. After defendant's motion was overruled the defendant requested the court to instruct the jury as follows: (2.) "To make the defendant liable in this case for the injury received by the plaintiff, the evidence must satisfy you that the defendant was guilty of

134 negligence causing the injury to plaintiff; and if you find from the evidence that the company, by its general manager or by its superintendent of the men under him, directed any one of the employés or workmen of defendant to notify the men working about the chutes in the pit whenever rock was to be drawn from the chutes into the train, and that this was a standing rule of the defendant company, then your verdict must be for the defendant whether such employé gave the notice and carried out the rule or not, as in that case the negligence of such employé in not giving the notice would not be the negligence of the defendant."

The court modified this by adding the words, "unless you also find from the evidence that the defendant was guilty of gross negligence in employing as such workmen or employés unsuitable, unskilled, and unreliable persons," and as thus modified the instruction was given.

This instruction as asked for by the defendant was clearly erroneous and it ought to have been refused. It entirely ignored any reference to the duty which the corporation owed to the plaintiff, and released it from all liability in the premises, provided the jury should find that its general manager or superintendent had directed any of the workmen to notify the men working about the chute when it would be drawn if there was a standing rule of the company to that effect. There was no rule of the company to that effect offered in evidence. It was not shown that the company had any "standing rule" upon the subject. The testimony shows that it was the custom of the night boss to give the notice, and that this duty had been assigned to him to perform.

It is true that upon the cross-examination of the plaintiff
135 when asked if that was a rule of the company he answered in the affirmative; but it is apparent from the record that he did not mean that the company had adopted a "standing rule." The instruction authorized the jury to find a verdict for the defendant, if it had such a standing rule, whether the plaintiff knew of it or not. The modification which the court made was also objectionable in this, that it introduced an issue that was not raised by the pleadings. It does not appear that this specific objection was made in the court below. Courts should avoid stating abstract principles which have no application to the issues raised in the case, either by the evidence or by the pleadings, even if such principles are in all respects correctly stated. The safest course for courts to pursue when an imperfect instruction is asked for is to refuse the instruction and to embody in its charge a correct statement of the principles applicable to the case. The court in its charge to the jury in this case instructed the jury upon all the issues raised in the case as favorably to the defendant as the law would warrant, and, taking all the instructions and charge together, we are of opinion that there is no ground for believing that the jury could possibly have been misled by the modification made to the instruction. How could the defendant have been prejudiced by the modification? It affirmatively appears that the jury must necessarily have found that the injury was caused by the negligence of Finley in failing to give notice to plaintiff when the rock in the chute was drawn. If the jury had found that Finley gave the notice, then, under the charge of the court, the verdict would, of course, have been
136 for the defendant. If Finley gave the notice there was no negligence and the jury could not have found that he was incompetent. If he did not give the notice he was guilty of negligence and his negligence was the negligence of the corporation, and this warranted the jury in rendering a verdict in favor of plaintiff, and it was wholly immaterial whether he was a suitable, skilled, or reliable servant.

3. The defendant further requested the court to give the following instruction: (4.) "The master is never liable for injuries received by a workman in its employ if the injuries are the result of any negligence on the part of the person injured; that is what the law calls contributory negligence, and if you find from the evidence

that the accident which caused the plaintiff's injuries was in any manner the result of want of ordinary care on the part of the plaintiff to avoid the accident and escape the damage, the plaintiff cannot recover, and your verdict must be for the defendant;" which the court modified by adding thereto the words, "unless you also find from the evidence that the defendant was guilty of gross negligence and the plaintiff's negligence was slight."

The court did not err in making this modification. Beach on Con. Neg., section 19.

The judgment of the district court is affirmed with costs.

Endorsed: Filed Oct. 2, 1894. F. D. Monckton, clerk.

137 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1893.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
v.
PATRICK WHELAN. } No. 161.

In error to the district court of the United States for the district of Alaska.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Alaska and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed with costs and interest, and the cause is remanded to said district court for such execution and further proceedings as may be necessary in accordance with the opinion of this court.

(Endorsed:) Judgment. Filed Oct. 2, 1894. F. D. Monckton, clerk.

138 At a stated term, to wit, the October term, A. D. 1894, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Tuesday, the sixteenth day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Cornelius H. Hanford, district judge; Honorable Thomas P. Hawley, district judge.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
v.
PATRICK WHELAN. } No. 161.

On motion of L. S. B. Sawyer, Esq., counsel for the defendant in error, it is ordered that a mandate issue herein to the court below forthwith.

139 At a stated term, to wit, the October term, A. D. 1894, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the 22nd day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Honorable Joseph McKenna, circuit judge; Honorable Cornelius H. Hanford, district judge; Honorable Thomas P. Hawley, district judge.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error, *vs.* PATRICK WHELAN. } No. 161.

T. Z. Blakeman, Esq., counsel for plaintiff in error, moves the court to recall the mandate heretofore issued, and stay all further proceedings herein for the period of thirty days.

Whereupon Lorenzo S. B. Sawyer, Esq., counsel for defendant in error, was heard, and the application was submitted to the court for consideration and decision.

And the same having been considered, it is ordered that said application be, and the same is hereby, denied.

140 In the Supreme Court of the United States of America.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error, *vs.* PATRICK WHELAN, Defendant in Error.

Petition for Writ of Error.

The petitioner, The Alaska Treadwell Gold Mining Company, a corporation organized under the laws of the State of Minnesota and having its mines and works on Douglas island, in the district of Alaska, states that there is pending in the United States district court of Alaska an action at law for damages claimed on account of personal injuries, wherein the petitioner herein is defendant and the said Patrick Whelan is plaintiff.

That the said plaintiff in his complaint filed in said action on the 22nd day of January, 1892, demanded judgment against said defendant in the sum of twenty thousand dollars.

That said action was tried in said district court of Alaska on June 16th, 1893, and a verdict rendered in favor of the plaintiff and against the defendant for the sum of twenty-nine hundred and fifty dollars, and on the 11th day of July, 1893, judgment was entered for said sum and for costs, amounting to $76.55.

That thereafter, on the 21st day of November, 1893, the said defendant, petitioner and plaintiff in error herein, obtained
141 from the United States circuit court of appeals for the ninth circuit a writ of error for the review of said judgment and proceedings by the said circuit court of appeals.

Thereafter, to wit, on the said 21st day of November, 1893, the said plaintiff in error gave in said action a supersedeas bond in the sum fixed by the order of a judge of said circuit court of appeals, to wit, in the sum of thirty-five hundred dollars; which bond was duly approved and filed in said action.

That the transcript of the record in said action was duly made up by the clerk of said district court of Alaska and was filed in the clerk's office of said circuit court of appeals Dec. 30th, 1893.

That said cause was heard by the said circuit court of appeals, and on the 2nd day of October, 1894, judgment was therein rendered by said circuit court of appeals affirming said judgment of the said district court for district of Alaska.

That on the 16th day of October, 1894, the said circuit court of appeals ordered its mandate to issue in said cause, and thereafter the same was duly issued and has not been recalled.

That the petitioner, the plaintiff in error herein, is aggrieved by the judgment of said district court for the district of Alaska and by the said judgment of affirmance and order for mandate by said United States circuit court of appeals for the ninth circuit.

That said Patrick Whelan is a laboring man without any property that is not exempt from execution, and petitioner desires a stay of process in said action until said judgments can be reviewed by the Supreme Court of the United States.

142 Wherefore petitioner, having annexed hereto its assignment of errors, asks that a writ of error issue herein to the said United States circuit court of appeals for the ninth circuit for review by the United States Supreme Court of said judgment of the circuit court of appeals and of the said judgment of the district court of the district of Alaska.

And petitioner asks that an order be made fixing the amount of bond and number of sureties that petitioner shall furnish upon said writ of error, and that the bond when given as required by the order shall stay further process in said action in said circuit court of appeals and said district court of Alaska.

T. Z. BLAKEMAN,
Attorney for Petitioner and Plaintiff in Error.

143 In the Supreme Court of the United States of America.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN, Defendant in Error.

Assignment of Errors.

The plaintiff in error presents with his petition for writ of error the following assignment of errors:

The plaintiff in error says that in the records and proceedings in that certain action sought to have reviewed on writ of error herein, to wit, that action pending in the United States district court for

the district of Alaska wherein Patrick Whelan is plaintiff and the said Alaska Treadwell Gold Mining Company is defendant, there is manifest error in this, to wit:

1. That facts stated in the complaint in said action are not sufficient to constitute a cause of action.

2. That the judgment is against law.

3. That the evidence is insufficient to justify or sustain the verdict.

4. That the court erred in denying defendant's motion for nonsuit.

5. That the court erred in refusing to direct the jury to
144 find a verdict for the defendant on the ground requested, to wit: 1. That the negligence, if any, which caused the injury was the negligence of a co-employee of plaintiff, to wit, Sam. Finley. 2. That the plaintiff contributed to the accident himself by carelessly and negligently walking over the top or mouth of chutes after he had warning that rock was to be drawn from them.

6. The court erred in refusing to instruct the jury at request of defendant to find a special verdict.

7. That the court erred in denying defendant's motion for a new trial.

8. The court erred in refusing to give the following instruction to the jury, requested by defendant, marked "2," to wit: "To make the defendant liable in this case for the injury received by the plaintiff the evidence must satisfy you that the defendant was guilty of negligence causing the injury to plaintiff, and if you find from the evidence that the company, by its general manager or by its superintendent of the men under him, directed any one of the employees or workmen of defendant to notify the men working about the chutes in the pit whenever rock was to be drawn from the chutes into the train, and that this was a standing rule of the defendant company, then your verdict must be for the defendant, whether such employee gave the notice and carried out the rule or not, as in that case negligence of such employee in not giving the notice would not be the negligence of the defendant."

The court also erred in modifying said instruction and giving the same as modified, the modification consisting in adding to said
instruction as follows, to wit: "Unless you also find from the
145 evidence that the defendant was guilty of gross negligence in employing as such workmen or employees unskilled and unreliable persons." To the giving of said instruction as modified the defendant excepted.

9. The court erred in refusing to give to the jury the following instruction, requested by defendant, marked "3," to wit: "The master is never liable for injuries received by a workman in its employ if the injuries are the result of any negligence on the part of the person injured; that is what the law calls contributory negligence, and if you find from the evidence that the accident which caused the plaintiff's injuries was in any manner the result of want of ordinary care on the part of the plaintiff to avoid the accident and

escape the damage, the plaintiff cannot recover and your verdict must be for the defendant."

The court modified such instruction by adding thereto the following words, to wit: "Unless you also find from the evidence that the defendant was guilty of gross negligence and the plaintiff's negligence was slight." and gave the same as modified, against the objection of the defendant, and thereby the court erred.

10. The court erred in refusing to give the following instruction, marked "4," and requested by the defendant, to wit:

"If you find from the evidence that any portion of the rock had been drawn from the chute 17 before the accident happened, and that a bridge had formed over the top of the chute, with a hollow underneath, by the lower rock having been drawn out, and that over the mouth of the chute the rock having become bound or lodged so as to form a shell over the top, and that while the plaintiff
146 was upon the same it broke and caved in, drawing plaintiff into the chute, whereby he received the injuries complained of, the plaintiff cannot recover, as such a condition was no fault of defendant.

The plaintiff in error assigns the following errors committed by said circuit court of appeals in rendering its judgment of affirmance, to wit:

11. The said circuit court of appeals erred in affirming the judgment of the district court for the district of Alaska.

12. The court erred in holding that Finley was not a fellow-servant of defendant in error.

13. The court erred in ruling that the said district court did not err in refusing to instruct the jury to find a verdict for the defendant.

14. The court erred in holding that the instruction quoted and given by said district court was correct, and in stating that said instruction was not objected to.

15. The court erred, after deciding that the modification of defendant's instruction No. "2" by the district court was error, in holding that such error did not prejudice the defendant.

16. The court erred in holding that the district court did not err in refusing to give instruction marked "4," requested by defendant, and in holding that said district court did not err in modifying and giving as modified said instruction.

17. The court erred in holding that the district court did not err in refusing to give instruction marked "2," as requested by the defendant.

The instructions and modifications thereof referred to in
147 specifications "15," "16," and "17," immediately preceding, are set out in specifications of error Nos. "7," "8," and "9" aforesaid.

Wherefore the said plaintiff in error prays that a writ of error and citation issue as provided by law, and that said judgment of the circuit court of appeals and the judgment of the district court of Alaska be reversed.

T. Z. BLAKEMAN,
Attorney for Plaintiff in Error.

(Endorsed:) 161. In the Supreme Court of the United States of America. The Alaska Treadwell Gold Mining Company, plaintiff in error, *vs.* Patrick Whelan, defendant in error. Petition for writ of error and assignments of error. Filed Nov. 12th, 1894. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

148 In the Supreme Court of the United States of America.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN, Defendant in Error.

On reading and filing the petition of said plaintiff in error—

It is ordered that a writ of error issue as prayed for; and it is further ordered that said plaintiff in error execute to said defendant in error a bond, with two sureties, in the sum of four thousand dollars, conditioned that said plaintiff in error shall prosecute its writ of error to effect and if it fail to make its plea good shall answer all damages and costs, and upon the approval of said bond by a justice of this court within the time required by — and the service of said writ within the time required by law all process upon the judgment of said circuit court of appeals and upon the judgment of the United States district court for the district of Alaska be stayed during the pendency of said writ.

Nov. 5th, 1894.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court U. S.

(Endorsed:) Order granting writ of error and fixing amount of bond. Filed Nov. 12th, 1894. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

149 Know all men by these presents that we, The Alaska Treadwell Gold Mining Company, as principal, and R. D. Fry and Wm. Alvord, as sureties, are held and firmly bound unto Patrick Whelan in the full and just sum of four thousand dollars, to be paid to the said Patrick Whelan, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the circuit court of appeals of the United States for the ninth circuit, in a suit depending in said court between The Alaska Treadwell Gold Mining Company, plaintiff in error, and said Patrick Whelan, defendant in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained from the Supreme Court of the United States a writ of error to reverse the judgment in the aforesaid suit,

and a citation directed to the said Patrick Whelan, citing and admonishing him to be and appear in the Supreme Court of the United States at the October term thereof, to be holden at the city of Washington, District of Columbia, within thirty days from the date of said writ of error:

Now, the condition of the above obligation is such that if the said Alaska Treadwell Gold Mining Company shall prosecute
150 said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ALASKA TREADWELL GOLD M. CO., [SEAL.]
By A. T. CORBUS, *Sec'y.* [SEAL.]
R. D. FRY. [SEAL.]
WILLIAM ALVORD.

Acknowledged before me the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA, }
Northern District of California, } ss:

R. D. Fry and Wm. Alvord, being duly sworn, each for himself deposes and says that he is a freeholder in said district, and is worth the sum of four thousand dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

R. D. FRY.
WILLIAM ALVORD.

Subscribed and sworn to before me this 29th day of October, A. D. 1894.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

Approved:
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

151 (Endorsed:) 161. Supreme Court of the United States. The Alaska Treadwell Gold Mining Company, plaintiff in error, *vs.* Patrick Whelan, defendant in error. Supersedeas bond on writ of error. Form of bond and sufficiency of securities approved. Filed Nov. 12th, 1894. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

152 United States Circuit Court of Appeals for the Ninth Circuit.

THE ALASKA TREADWELL GOLD MINING COMPANY, Plaintiff in Error,
vs.
PATRICK WHELAN. } No. 161.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and fifty-one pages, numbered from 1 to 151, inclusive, to be a full, true, and correct copy of the printed record and of all proceedings in said cause in our said court, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 27th day of December, A. D. 1894.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

153 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Alaska Treadwell Gold Mining Company, plaintiff in error, and Patrick Whelan, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

154 *The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Endorsed:] D. No. 161. Supreme Court of the United States. The Alaska Treadwell Gold Mining Company, plaintiff in error, *vs.* Patrick Whelan, defendant in error. Writ of error. Filed Nov. 12th, 1894. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

155 UNITED STATES OF AMERICA, *ss:*

To Patrick Whelan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Alaska Treadwell Gold Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 5th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

156 [Endorsed:] D. Alaska Treadwell Gold M. Co. *vs.* Whelan. Citation. Filed Dec'r 24, 1894. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

I hereby acknowledge service by copy of the within citation. Nov. 13th, 1894.

L. S. B. SAWYER,
Attorney for Patrick Whelan.

Endorsed on cover: Case No. 15,774. United States circuit court of appeals, ninth circuit. Term No., 215. The Alaska Treadwell Gold Mining Company, plaintiff in error, *vs.* Patrick Whelan. Filed January 17th, 1895.

No. 218 T.D.

Brief of Blakeman for P.C.

CASE No. 218.

Filed Dec. 28, 1896.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

THE ALASKA TREADWELL GOLD MINING COMPANY,
Plaintiff in Error,

vs.

PATRICK WHELAN,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

T. Z. BLAKEMAN,
Attorney for Plaintiff in Error.

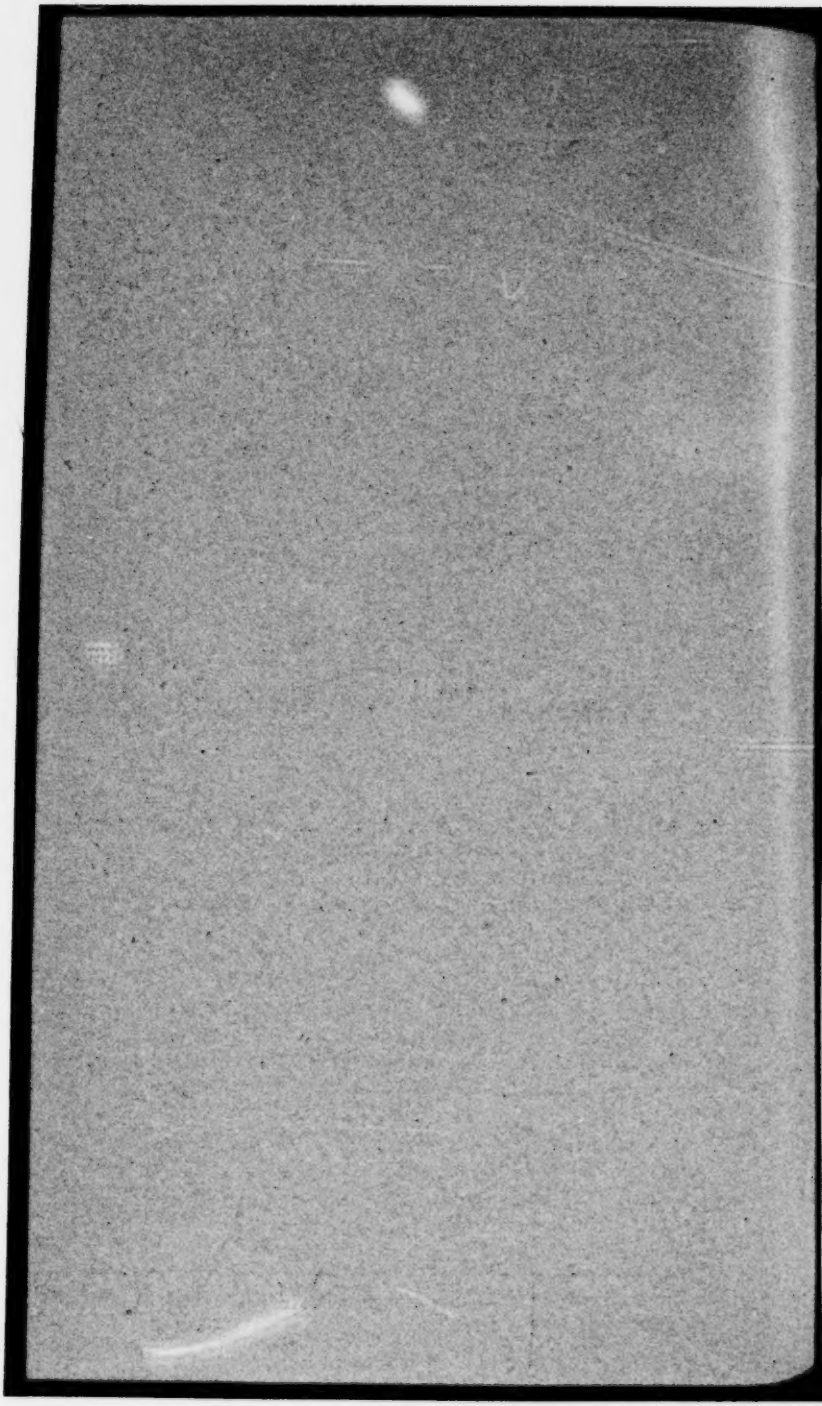
Filed this.....day of December, 1896.

JAS. H. MCKENNEY, *Clerk.*

By.....

Deputy Clerk.

PRESS OF H. S. CROCKER COMPANY, SAN FRANCISCO.



IN THE

Supreme Court of the United States.

No. 215, October Term, 1896.

THE ALASKA TREADWELL GOLD MINING COMPANY,
Plaintiff in Error,

vs.

PATRICK WHELAN,
Defendant in Error.

Statement for Plaintiff in Error.

This action was begun January 22, 1892, in the District Court for Alaska to recover damages for personal injuries received by the defendant in error while a laborer in the service of the plaintiff in error at its mines in Alaska.

The defendant in error alleged in his complaint that he had been damaged in the sum of twenty thousand dollars, and demanded judgment for that sum.

The plaintiff in error in its answer denied the acts of negligence charged, and alleged that the injury was caused by, first, the negligence of a co-employee, and, second, by the negligence of the defendant in error himself.

There was a trial before a jury and a verdict for plaintiff in the sum of two thousand nine hundred and fifty dollars, and judgment accordingly. On the 21st day of November, 1893, the United States Circuit of Appeals for the Ninth Circuit granted the defendant in said action a writ of error to said District Court of Alaska, and said case was by said writ brought to said Court of Appeals for review. The case was heard by said Court of Appeals on its merits, and the judgment of the District Court of Alaska affirmed October 2, 1894 (rec. p. 126).

And the case has been brought to this court on writ of error to said Court of Appeals.

MATERIAL FACTS SHOWN BY THE EVIDENCE.

[References to record are to original or side pages.]

The business of the mining company at Douglas Island was divided into three departments, to wit:

The mine, the mill and the chlorination works. The business generally was under the control of a general manager, and each department had a foreman or superintendent under said general manager (p. 84 of record). The mine department had three shifts or gangs of workmen—two day and one night shift. The shifts had separate bosses. One Sam Finley was the boss of the night shift, and in that shift the plaintiff worked (p. 69 of record). Plaintiff was forty-six years of age; his duty was to break rock and get it ready to go through the chutes to be loaded into cars for conveyance to the mill, and he had been so employed for six months when the accident occurred, on November 23, 1891 (p. 26 of record). In a place called the "pit" the quartz rock blasted from the ledges was thrown, where it was broken into small pieces and made ready for the mill.

From the "pit" several chutes led downward into a tunnel, in which there was a railroad track leading out to the mill and on which cars were run to receive the broken rock from the chutes. The lower end of the chutes, which were several feet below the floor of the pit, had gates to be opened when rock was to be drawn from the chutes into the cars.

Chute No. 17 opened into the pit near the west wall of the pit. On the night of November 23d said chute was full of broken rock, and rock was also piled over it several feet deep on the floor of the pit. On the top of this pile were some large pieces of rock, and early in the evening the plaintiff and a companion laborer, Archie McCormick, were directed by the said boss Finley to break the said large pieces of rock over chute No. 17.

It was Finley's duty to direct when rock was to be drawn from any particular chute. It was customary, and in accordance with a rule of the company, for Finley to go up into the pit and notify the rockbreakers when he was going to draw from any particular chute, so that they might stand aside from that chute.

The plaintiff testified that Finley did not come back into the pit after putting him and McCormick to work over chute 17 about 9 o'clock that night, and that about two hours thereafter the rock from said chute was drawn and he was carried through with the rock.

McCormick, plaintiff's companion workman, testified that Finley came back into the pit about 10 o'clock, and motioned and called for them to come off the pile over No. 17 ; that he complied and was told by Finley to break rock at another place ; that the plaintiff came down off the pile over No. 17 with him, but that he did not know whether plaintiff heard or saw Finley or not ; that Finley then left the pit again ; that plaintiff went back to breaking rock over No. 17, and about half an hour or an hour thereafter No. 17 was drawn and plaintiff went through with the rock.

Finley testified that he went back into the pit about 10 o'clock and called plaintiff and McCormick off the pile over chute No. 17 ; told them that he was going to draw from that chute, and put them to work in another part of the pit ; that he then left the pit again, and in about twenty minutes ordered No. 17 to be drawn.

The plaintiff testified that Finley always, prior to this, came and notified them when he was going to draw from any chute ; that such was Finley's custom, and that it was a rule of the company that the shift boss should notify the men in the pit what chute he intended to draw from, and when (p. 39).

The only evidence submitted by the plaintiff was his own testimony.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court denied the following motion for nonsuit made by defendant's attorney at close of plaintiff's case, to wit :

" I make the motion for a nonsuit on that ground that the " evidence of the plaintiff discloses that he was an employee of " the defendant, and that upon his testimony the evidence " shows that the negligence, if any, which caused the accident " was the negligence of a co-employee, to wit, Sam Finley ; " and that, therefore, the company is not liable " (p. 40).

The Court also refused to direct the jury to return a verdict for defendant, at the motion of defendant's counsel, made at the close of the evidence, as follows :

" First. That it appears from the testimony that the neg- " ligence, if any, which caused the accident to the plaintiff " and the consequent injuries, are the result of the negligence " of a co-employee, or fellow-workman, Sam Finley, for " which the defendant is not liable.

" Second. That it appears from the testimony that the " plaintiff contributed to the accident himself by carelessly

" and negligently walking over the top or mouth of the chute " after he had warning that rock was to be drawn from there " (p. 100).

2. The evidence is insufficient to justify or sustain the verdict in this: (1) It shows that the cause of the injury to plaintiff was the negligence of plaintiff's fellow-servant; and (2) plaintiff's own negligence.

3. The Court erred in refusing to give the following instruction to the jury requested by defendant, marked 2, to wit: "To " make the defendant liable in this case for the injury received " by the plaintiff, the evidence must satisfy you that the de- " fendant was guilty of negligence causing the injury to plaintiff; " and if you find from the evidence that the company, by its " general manager or by its superintendent of the men under " him, directed any one of the employees or workmen of de- " fendant to notify the men working about the chutes in the " pit whenever rock was to be drawn from the chutes into the " train, and that this was a standing rule of the defendant " company, then your verdict must be for the defendant, " whether such employee gave the notice and carried out the " rule or not, as, in that case, the negligence of such employee " in not giving the notice would not be the negligence of the " defendant " (p. 101).

The Court also erred in modifying said instruction and giving the same as modified. The modification consisted in adding to said instructions as follows, to wit: " Unless you also find from " the evidence that the defendant was guilty of gross negligence " in employing as such workmen or employees unsuitable, un- " skilled and unreliable persons."

4. The Court erred in refusing to give to the jury the following instruction requested by defendant, marked 3, to wit:

" The master is never liable for injuries received by a work- " man in its employ if the injuries are the result of any negli- " gence on the part of the person injured. That is what the " law calls contributory negligence; and if you find from the " evidence that the accident which caused the plaintiff's injuries " was in any manner the result of want of ordinary care on the " part of the plaintiff to avoid the accident and escape the " damage, the plaintiff cannot recover, and your verdict must " be for the defendant " (p. 102).

The Court modified such instruction by adding thereto the following words, to wit: " Unless you also find from the evi- " dence that the defendant was guilty of gross negligence and " the plaintiff's negligence was slight," and gave the same as modified against the objection of the defendant, and thereby the Court erred.

Points and Authorities for Plaintiff in Error.

I.

THE COURT ERRED IN MODIFYING INSTRUCTION NO. 2.

The Court refused to give instruction No. 2, as requested by defendant, but added thereto, against the objections of defendant, words which injected into the case a new element of liability, which was not supported by the pleading or by any evidence, to wit: "Unless you find from the evidence that "the defendant was guilty of gross negligence in employing "as such workmen or employees unsuitable, unskilled and unreliable persons" (rec., p. 101).

The modification of the instruction was not only erroneous but was capable of having a most pernicious effect on the jury. It injected into the case a new cause of action or ground of recovery, to wit, negligence of defendant in selecting its employees. Neither the pleadings nor evidence supported or suggested this new cause of action.

"One injured by the negligence of a fellow-servant must "*allege and prove* his ignorance of the latter's negligent habits. "He must *allege* want of care in engaging the servant, or that "he was retained after notice of his shortcomings."

Lake Shore Ry. Co. vs. Stupak, 108 Ind., 1.
Ind. Ry. Co. vs. Daily, 110 Ind., 75.
Laning vs. New York, etc., R. Co., 49 N. Y., 521.
S. C., 10 Am. Rep., 417.
Mich., etc., R. Co., vs. Dolan, 32 Mich., 510.

The plaintiff's testimony showed that Finley was not of negligent habits. Finley had never failed before to notify him (pp. 30, 33 and 39, record).

"A single act of negligence does not necessarily charge the "master with notice of the servant's incompetency."

Baltimore E. Co. vs. Neal, 65 Md., 438.

The modification of the instruction was not supported or justified by a line of pleading or a word of evidence.

Who can say that the verdict of the jurors was not the result of a conclusion of theirs, in the language of the Judge's charge, " that the defendant was guilty of gross negligence in employ- " ing, as such workmen or employees unsuitable, unskilled and " unreliable persons." The error was repeated and emphasized by modifying Instruction No. 3 in same manner (rec., p. 102).

II.

INSUFFICIENCY OF EVIDENCE.

The evidence is not only insufficient to sustain the verdict, but shows affirmatively without conflict *that the cause of the injury to plaintiff was the negligence of shift boss* Finley in not notifying plaintiff when the rock was to be drawn from the chute. This point embraces specifications of error 1 and 2 aforesaid, and assignment of errors 3, 4, 5 and 6 (p. 115 of record).

The trial Court considered the point involved a " close question," and was satisfied that if Finley and the plaintiff were fellow-servants within the meaning of the rule applicable to injuries caused by negligence of fellow-servants, the plaintiff was not entitled to recover (see Court's ruling on motion for nonsuit, pp. 40, 41 of record)

At the trial great stress seems to have been placed upon the fact that Finley was a boss or foreman of the night shift of workmen at the mine. While the plaintiff attempted to show that on one or two occasions Finley had discharged a laborer, the evidence without conflict shows that Finley was only the boss of a night shift of workmen, and his duties were: 1st, to see that the men did their work; and, 2d, to direct when rock was to be drawn from the chutes, and to notify the men in the pit which chute was to be drawn, so that they might stand aside from it.

Finley's position in the service of the company was that of a simple employee having specific duties defined by his superior, the foreman of the mine (pp. 69 and 70 of record).

Finley, though an employee of superior grade to the plaintiff, was two degrees removed from the management of the business of the common master.

Over Finley there was the foreman of the mine department, and over said foreman there was the general manager or superintendent of the entire business.

Finley being of a superior grade to plaintiff in the common employment, and in certain respects having the authority to direct the movements of the plaintiff, was no evidence that he was not the fellow-servant of the plaintiff in respect to the cause of the accident.

The cause of the accident was Finley's neglect of the rule of the company to notify plaintiff before he drew the rock from chute No. 17.

Plaintiff testified that he knew the rule of the company in this respect; that Finley was accustomed to perform that duty; that he had always performed it properly theretofore, and that he relied upon Finley performing his said duty on the night in question (see pp. 39, 33, 30 of record).

Mr. Beach, in his work on Contributory Negligence, sec. 326, has stated the rule to determine who are fellow-servants, as follows:

"The mere fact that one of a number of servants who are in "the same line of employment for a common master has the "power to control and direct the actions of the others with "respect to such employment, will not of itself render the "master liable for the negligence of the governing servant.

"On the other hand, the mere fact that the governing ser- "vant sometimes, or generally, labors with the others as a "common hand, will not of itself exonerate the master from "liability for the former's negligence in the exercise of his "authority over the others. Every case in this respect must "depend upon its own circumstances. If the negligence com- "plained of was some act done or omitted by one having such "authority which relates to his duties as a co-laborer with those "under his control, and which might just as readily have hap- "pened with one of them having no such authority, the com- "mon master will not be liable."

Chicago, etc., R. Co. vs. May, 108 Ill., 302.

Mr. McKinney on Fellow-servants, sec. 23, has stated the rule as follows:

"The true test, it is believed, whether an employee occupies "the position of a fellow-servant to another employee, or is the "representative of the master, is to be found, not from the "grade or rank of the offending or injured servant, but it is to "be determined by the character of the act being performed by

" the offending servant, by which another employee is injured; " *or in other words, whether the person whose status is in question* " *is charged with the performance of a duty which properly belongs* " *to the master.*"

The work of raising the gate and drawing the rock from the chutes and of going into the pit above and notifying the workmen there to stand aside from the particulur chute to be drawn, was a menial duty, and was no more the duty of the employer than the breaking of the rock to fill the chutes. It was work that the commonest laborer could perform. It was work specifically assigned to Finley under a rule of the company, and the plaintiff knew of the rule and of Finley's duty thereunder (pages 30, 33 and 39 of the record).

The Supreme Court of Massachusetts has stated the rule as follows:

" The rule of law that a servant cannot maintain an action " against his master for an injury caused by the fault or negli- " gence of a fellow-servant is not confined to the case of two " servants working in company or having opportunity to con- " trol or influence the conduct of each other, but extends to " every case in which the two, deriving their authority and " compensation from the same source, are engaged in the same " business, though in different departments of duty; and it " makes no difference that the servant whose negligence causes " the injury is a sub-manager or foreman of higher grade or " greater authority than the plaintiff."

Holden vs. Fitchburg R. Co., 129 Mass., p. 268.

The Supreme Court of the United States has favored the rule as laid down by the Supreme Court of Massachusetts.

Randall vs. Baltimore & Ohio R. R. Co., 109 U. S., 484.

The Court in said case stated a reason for the rule especially applicable to the case at bar, to wit: " The duties of the two " (employees) bring them to work at the same place at the " same time, so that the negligence of the one *in doing his* " *work* may injure the other in doing his work."

The italics are ours and call attention to the fact that in the case at bar it was the negligence of Finley *in doing his work* that caused the injury.

The case of Randall vs. B. & O. R. R., supra, is authority for the proposition that the trial court in a proper case ought to direct a verdict for the defendant.

III.

JURISDICTION.

No question as to the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit was raised by either party, nor did said Court, in its opinion filed, touch upon the subject (rec., p. 126).

1. The presumption, however, is that the said Court of Appeals determined that it had jurisdiction. It had that power (McLish vs. Roff, 141 U. S., 663). And no one has sought to have this Court review that determination. In the case of Northern Pacific R. R. vs. Amato, 144 U. S., 465 at 472, defendant in error on motion to dismiss, in this Court, contended that as the question of jurisdiction of the Circuit Court was raised by the defendant in the Circuit Court of Appeals the case might have been brought by writ of error directly from the Circuit Court to this Court, under sec. 5 of the Act creating the Circuit Court of Appeals. This Court, in denying the motion to dismiss, said: "But it does not appear by the record that "on the trial the defendant made any objection to the jurisdic-"tion of the Circuit Court." And even "if a writ of error "from this Court to the Circuit could have been taken, yet "as the defendant did not take such a writ of error, but "took one from the Circuit Court of Appeals to the Circuit "Court, the plaintiff cannot be heard to assert, as the ground "of this motion, the fact that the defendant might have taken "a writ of error from this Court to the Circuit Court."

2. The only question, therefore, it seems, for this Court to consider on this subject is, does the statute provide for a review by this Court of cases in which the judgment of the Circuit Court of Appeals is not final.

The said case of Northern Pacific R. R. vs. Amato (144 U. S., p. 471) is authority on the question. In that case this Court upheld its jurisdiction on the ground that "the jurisdiction of "the Circuit Court was not dependent entirely upon the fact "that the opposite parties to the suit were one of them an alien "and the other a citizen of the United States, or one of them "a citizen of one State and the other a citizen of a different "State."

In the case at bar the jurisdiction of the District Court of Alaska was not "dependent entirely" upon the citizenship of the parties. The judgment of the Circuit Court of Appeals therefore not being final and the matter in controversy exceeding one thousand dollars, besides costs, the case is reviewable in this Court by writ of error to the Circuit Court of Appeals (sec. 6, Act. Mch. 3, 1891).

We submit, however, that this Court has decided that the final judgments, generally, of the District Court of Alaska are reviewable in the Circuit Court of Appeals for the Ninth Circuit.

Steamer Coquitlam vs. United States, 163 U. S., 347.

That case came before this Court "upon a certificate from "the Circuit Court of Appeals as to its jurisdiction to entertain "an appeal from the decree of the District Court of Alaska." (We quote from the Court's statement of the certificate.)

It is true that the Coquitlam case was an admiralty case; but this Court declared the jurisdiction of said Circuit Court of Appeals in general terms. Said the Court:

"Looking at the whole scope of the Act of 1891, we do not "doubt that Congress contemplated that the final orders and "decrees of the courts of last resort in organized Terri- "tories of the United States,—by whatever name those courts "were designated in legislative enactments,—should be reviewed "by the proper Circuit Court of Appeals, leaving to this Court "the assignment of the respective Territories among the exist- "ing circuits."

4. Even if the said Circuit Court of Appeals had not jurisdiction in the case at bar, and this Court had, by writ of error direct to the District Court of Alaska, under section 7 of the Act providing a civil government for Alaska (23 Stat. L., p. 24), still the case is here, by writ of error with proper assignments of error, and the jurisdiction exists in this Court to hear and determine the case.

Respectfully submitted,

T. Z. BLAKEMAN,
Attorney for Plaintiff in Error.

No. 215. 33.
Brief of Foote for D. C.
Filed Mar. 17, 1897

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 215.

THE ALASKA TREADWELL MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

PATRICK WHELAN, DEFENDANT IN ERROR

BRIEF FOR THE DEFENDANT IN ERROR.

OSCAR FOOTE,
For Defendant in Error.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 215.

THE ALASKA TREADWELL MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

PATRICK WHELAN, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

In the following pages the parties will be designated by their titles in this court.

The plaintiff in error was engaged in Alaska in mining and milling ores, and through its foreman, Finley, had employed the defendant in error to work about the mill.

While so engaged the defendant in error was seriously maimed and crippled and he brought action to recover damages for injuries received by the negligence of the plaintiff in error.

The complaint alleges that the defendant in error, while in the employ of the plaintiff in error, was severely and permanently injured by being drawn through a chute from the ore pit when, without his knowledge, the draw below was opened to load the cars used in conveying broken ore to the mill; that this injury occurred without negligence on his part, but by the negligence of the plaintiff in error.

The answer denies that the defendant in error was injured to the extent charged, or that his injury was caused by the negligence of the plaintiff in error, and sets up contributory negligence on the part of defendant in error.

The jury gave a verdict for the defendant in error for $2,-050.

The litigant mining company was granted a writ of error by the Federal Court of Appeals for the ninth circuit, and on re-

view said court of appeals affirmed the judgment of the United States District Court for Alaska (rec. p. 70 print).

The cause is now here on writ of error to said court of appeals.

THE ASSIGNMENTS OF ERROR.

On page 80, print, it will be observed that: "The plaintiff assigns the following errors committed by the Circuit Court of Appeals," to whom the writ of error in this cause is directed, and then follow seven assignments of error, numbered 11 to 17.

In the brief of the learned counsel for the plaintiff in error the "errors relied upon," and the only points of the case discussed, apply to and involve only the two questions—fellow servant and contributory negligence—therefore, we will accordingly confine our attention to those questions.

It is believed that there was no essential error in the court's modification of instructions No. 2. (Org. R. 101, print 56.) The jury was instructed upon all the issues in the case as favorably to the defendant as the law would warrant, and taking all the instructions and charge together, it does not appear that the jury could have been misled by the modification.

The jury must have found that the injury to the defendant in error was the result of Finley's negligence to give due notice when the rock in the chute was to be drawn. There was no negligence if Finley gave the notice, and the defendant in error would have got a verdict. The jury could not have found that Finley was incompetent. The jury was warranted in finding for the defendant in error if the notice was not given, for then the company, the plaintiff in error, was negligent through Finley, whose duty it was to give notice.

We fail to see how the modification could in any way work a prejudice to the plaintiff in error.

NEGLIGENCE OF THE MASTER.

Learned counsel for the plaintiff in error grant that the evidence shows affirmatively that the cause of the injury to the defendant in error was the negligence of Foreman Finley in

not notifying him when the ore was to be drawn from the chute.

This raises the question of the relation that was found by the jury to exist between the injured defendant in error and the plaintiff in error company, acting through its agent, Finley.

Upon this question depend all save one of the seven assignments of error, upon which the writ of the Circuit Court of Appeals is founded, and also whether there was error in overruling the motion to return a verdict for the defendant—the plaintiff in error here.

Reasonable protection and safety for the defendant in error while engaged in his work was an obligation upon the plaintiff in error. Due and fair warning that the chute was to be drawn was a duty that the plaintiff in error owed the employe.

The company could give such warning only through some agent or employe, specifically charged with that duty. It does not appear that the duty of the company was delegated to the general manager of the mine and mill, or to the superintendent, but it is in evidence (rec. pp. 38, 39 print) that such duty was delegated by the company to the foreman or "boss" of the department of work engaged in breaking and supplying ore to the mill.

The jury found, under the instructions (rec. p. 60), that Foreman Finley was employed and delegated to do the duties of the master, and that negligence in the performance of the duty thus delegated to him must be regarded as the negligence of the master.

The warning of Whelan was a duty the company owed him.

Wood, in his "Law of Master and Servant," writes:

"When a foreman or other person, by whatever name he may be known, is put by the master in his place to discharge some duty which the master owes to the servant, as to such duty he is not a co-servant, but a representative of the master. If the master delegates a duty to another he is answerable for the manner in which the duty is discharged, and he cannot screen himself from liability upon the ground that he has se-

lected a competent person to discharge the duty for him, for the duty is one which, in law, he is regarded as having contracted to discharge in person."

Though the evidence shows that Foreman Finley was, to the extent of hiring and discharging laborers, a representative of the principal (rec. p. 18.

"Q. You say Finley hired you?

"A. Yes.

"Q. Who was it Finley discharged?

"A. Dan Sullivan.

"Q. Who kept your time?

"A. I said Finley did."

Of another witness, p. 48.

"Q. Did the wages come through Finley?

"A. Yes, sir."

Page 51.

"Q. Did you know of Finley hiring or discharging men?

"A. I know of his discharging two men.")

it may be reasonably contended that it is wholly immaterial whether he acted for the company in hiring the workmen or not. The test is, was he delegated to observe reasonable care and afford that protection that was due the workmen from the employer during the hazardous operation of drawing the chute while the workman was engaged at its head or mouth by the direction of the employer?

It has been enunciated in McKinney on Fellow Servants, sec. 23, that: "The true test, it is believed, whether an employe occupies the position of a fellow servant to another employe, or is the representative of the master is to be found, not from the grade or rank of the offending, or injured, servant, but it is to be determined by *the character of the act being performed by the offending servant by which the other employe is injured*; or, in other words, whether the person whose status is in question is charged with the performance of a duty which belongs to the master. The master, as such, is required to perform certain duties, and the person who discharges any of these duties, no matter by what name he may be designated,

cannot be a servant within the meaning of the rule under discussion."

We do not deny that the muscular operation of drawing the gate of the chute was a menial duty; but the duty of notifying the workmen in the mouth of the chute, relying and dependent upon due notice of danger, the duty of drawing the gate in such reasonable and safe manner as to guard and shield the workman from injury, was the lawful and bounden duty of the employer company.

"The master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the work to be done."

McGowan *v.* La Plata Mining Co., 3 McCrary, 393.

It is believed it can be reasonably stated that where a method or contrivance is used which is dangerous to the public or the workman, and the control of which is exclusively in the owner of such contrivance, or one acting for him, in such case the *value of human life* and the *dangerous character of the contrivance* make it public policy and create a rule of law that the owner, either directly or through the one in control, shall be held to the greatest care which human reason, foresight and skill can produce, and which is necessary to protect human life from the dangerous contrivance he has set in operation.

Horace Smith on Negligence, pp. 142 and 143;
Broom's Maxims of Law, p. 390;
Shearman and R. Negligence, sec. 683-691;
Union Pac. R. Co. *v.* McDonald, 152 U. S., 262.

Beach, in his justly eminent work on Contributory Negligence, in discussing the related question of fellow servant, says, sec. 302:

"The master, when taking a hand and engaging in common labor with the servant, does not thereby lose his position as master or become a fellow servant in such legal sense that the servant impliedly undertakes to assume the risk of injury from his negligence when so jointly injured."

Ryan *v.* Fowler, 24 N. Y., 410;
Anderson *v.* N. J. Co., 7 Robt., 611.

The authority just quoted further says:

"Where one servant is placed by the employer in a position of subordination and subject to the orders and control of another in such a way and to such extent that the servant so placed in control may reasonably be regarded as representing the master, when such inferior servant, without fault and while discharging his duty, *is injured by the negligence of his superior servant*, the master is liable in damages for the injury." (Sec. 325.)

In N. Pac. R. R. Co. *v.* Peterson, 162 U. S., 346.

The Supreme Court held that "if the master, instead of personally performing the obligations due his servant, engages another to do them for him, he is liable for the neglect of that other, which is not the neglect of a fellow servant, but of the master."

Vide Railroad Co. *v.* Baugh, 149 U. S., 369;
Vide U. P. R. R. Co. *v.* Daniels, 152 U. S., 684.

We invoke the law, as promulgated in these opinions, as well as the further ruling in the first named case, upon a collateral point, wherein the court says: "Where the business of the master is divided into departments of service the persons placed by the master in charge of these separate branches or departments, and *given control therein*, may be considered, with reference to employes under them, vice-principals and representatives of the master as fully as if the entire business of the master were under one superintendent."

With reference to the neglect of the master in the case under discussion, we believe a case in point is that of

Gilmore *v.* N. P. R. R. Co., 18 Fed. Rep., 860,

in which it appeared that the railroad company in building its road had many gangs of men at work at from three to five miles apart, under the control and direction of foremen, with

the power to employ and discharge, subject, themselves, to the control of a general superintendent, who passed along the line and inspected the camps at certain periods. Giant powder was used, and in such case the foreman was charged with the duty of handling the powder and thawing it when frozen.

The superintendent had given notice not to thaw powder before a fire, and provided a safe appliance called a "heater" for the purpose.

The plaintiff was employed in a gang where powder was being thawed without this safe appliance, and while assisting in so thawing the powder, by direction of the foreman, was injured by its explosion.

It was held that the foreman, so far, stood in the place of the defendant, that his directing the plaintiff to assist in thawing powder without using a means to avoid danger was an act of neglect for which the defendant was responsible to plaintiff.

Of equal directness of application is the case of

L. S. & Mich. R. Co. *v.* Levalley, 36 Ohio St., 221.

A foreman was in charge of a set of hands, repairing cars while on the track in the railroad company's yard, in which trains were accustomed to be made up; it was also the duty of the foreman to help with the hands in doing the work. While the foreman and a hand were engaged in repairing a car, and the latter was, by the foreman's order, at work under it, he was injured by another car moving on the same track striking the car under which he was.

It was held that it was the duty of the foreman, in putting the hand to work under the car, to use reasonable care to protect him from danger arising from switching of cars and the making up of trains on the same track, and for injury resulting from such negligence the company was liable.

In Ryan *v.* Bagaley, 50 Mich., 179,

it was held that "a 'mining captain' and the miners are not fellow servants." The mining captain in that case was subservient to a higher official, as has been claimed the foreman. Fin-

ley, was in this case at bar, but was superior to the miners under his direction.

In Berea *v.* Kraft, 31 Ohio, 287,

it was decided that "a mine foreman in charge of hands is not a fellow, but a superior, servant."

In Brown *v.* Sennett, 68 Cal., 225,

the foreman of laborers to whom a stevedore delegates the management of unloading a vessel was found to not be a fellow servant.

The same rule prevailed in

Mulcairns *v.* Janesville, 67 Wis., 24,

relative to the superintendent and workmen engaged in digging a cistern.

CONTRIBUTORY NEGLIGENCE.

There was no error in the Circuit Court of Appeals in finding that the trial court did not err in submitting to the jury the question of negligence on the part of the defendant in error. In determining this question the jury had to consider the surroundings in which the defendant in error was placed, the noise of the drills, the mouth of the chute being covered over with rock and the conflict of evidence as to whether or not Finley notified the plaintiff when the rock was to be drawn, made it the duty of the trial court to submit the question to the jury.

N. P. R. Co. *v.* Amato, 144 U. S., 467;
Kane *v.* Northern R. Co., 128 U. S., 91;
Jones *v.* E. Tenn. Co., 128 U. S., 443.

It is also believed that the Circuit Court of Appeals made no error in finding no error in the instructions as modified by the trial court as to contributory negligence of the defendant in error, the plaintiff below.

Beach, in his writings on Contributory Negligence, sec. 25, says: "When the defendant's negligence is the proximate cause, and that of the plaintiff is the remote cause, the plaintiff may have his action. And if the negligence of the plaintiff being only the remote cause, and the defendant might have avoided inflicting the injury by exercise of ordinary care, the action for damages is maintainable.

"The plaintiff's negligence must *substantially* contribute to produce the injury in order to avail the defendant."

We submit that the plaintiff's negligence to constitute a defence must have been so far an *efficient cause* of the injury, that without his negligence the injury would not have happened.

Vide Beach on Con. Negligence, sec. 19, et. seq.;
Kane *v.* N. Cent. R. Co., 128 U. S., 91;
Daley *v.* Norwich R. Co., 26 Conn., 591;
Grippen *v.* N. Y. R. Co., 40 N. Y., 34;
Steamboat Co. *v.* Vanderbilt, 16 Conn., 420.

Respecting the jurisdictional question discussed by our learned opponent, we admit the jurisdiction of the Circuit Court of Appeals in this cause, and the jurisdiction here.

Upon the foregoing points we respectfully submit that no error has been permitted and that the judgment should be affirmed.

OSCAR FOOTE,
For Defendant in Error.

ALASKA MINING COMPANY *v.* WHELAN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 38. Submitted March 17, 1897. — Decided October 18, 1897.

Where the business of a mining corporation is under the control of a general manager, and is divided into three departments of which the mining department is one, each with a superintendent under the general manager, and in the mining department are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage and discharge the men under him, is a fellow-servant with them; and the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men.

THIS was an action brought in the District Court of the United States for the District of Alaska against a mining corporation by a workman in its employ. The complaint alleged that "on November 23, 1891, and for nearly six months prior thereto, this plaintiff was in the employ of said defendant, as a workman in the mine of said defendant, in breaking and preparing rock for the chutes, and doing other work as ordered by the foreman of said defendant, one Samuel Finley, under whom this plaintiff worked, and from whom he received his orders; that on November 23, 1891, while this plaintiff was yet in the employ of said defendant, he was ordered by the foreman of said defendant company to break rock immediately above and over one of the chutes of the defendant company; that in compliance with the orders of the foreman of said

defendant, and as became his duty so to do, the plaintiff proceeded to his place immediately above and over said chute, and commenced to break said rock as he had been ordered so to do; and that while so engaged, and carefully and skilfully and without negligence performing his duties as aforesaid, and without the knowledge of this plaintiff, and carelessly and negligently, the foreman of said defendant drew or caused to be drawn the gate at the mouth of said chute over which this plaintiff was working, thereby causing the rock at the head of said chute to be suddenly drawn in, carrying this plaintiff with it, through said chute, a distance about thirty feet, and completely covering him with great quantities of rock and debris," thereby greatly injuring him.

At the trial, the plaintiff being called as a witness in his own behalf, gave evidence tending to support the allegations in the complaint; and testified that on the night of November 23, 1891, he was sent by Samuel Finley, the boss in the pit, to the top of a chute, there to break rock and pound it fine enough to go through the chute, which connected with the tunnel through which the rock was shot into cars to be taken to the mill; that at the bottom of the chute was a gate, always closed until the chute was filled and orders given to draw it; that Finley's custom was to come upon the top of the chute to see if the rock was broken fine enough, and, if it was all right, to tell the men to come down as he was going to draw; and that at the time in question, after putting the plaintiff and others to work at the chute, he never gave them any notice that he was going to draw.

Finley, being called as a witness for the defendant, testified that he did give notice to the men before drawing the chute. The defendant introduced evidence, which was uncontradicted that its business was under the control of a general manager, and was divided into three departments, the mine, the mill and the chlorination works, each of which departments had a foreman or superintendent under the general manager; that the mine department had three shifts or gangs of workmen, two by day and one at night; and that Finley was boss of the one at night.

There was conflicting evidence upon the question whether Finley had authority to engage and discharge the workmen under him.

No other material testimony was introduced as to the relation of the plaintiff and Finley to each other or to the defendant.

At the close of the whole evidence, the defendant requested the court to direct the jury to return a verdict for the defendant, upon the ground that the plaintiff's injuries were the result of the negligence of a co-employé, or fellow-workman, Samuel Finley, for which the defendant was not liable. The court overruled the motion, and the defendant excepted to the ruling.

The court afterwards instructed the jury as follows: "The true test is whether the person in question is employed to do any of the duties of the master; if so, he cannot be regarded as the fellow-servant, but is the representative of the master, and any negligence on his part in the performance of the duty thus delegated to him must be regarded as the negligence of the master. You have heard the testimony as to Finley's authority and duties, and whether or not he had any power to employ men or discharge them, or whether he simply acted under another man who had the same power over him that was exercised over other laborers."

The jury returned a verdict for the plaintiff, and judgment was rendered thereon, and affirmed by the Circuit Court of Appeals. 29 U. S. App. 1. The defendant sued out this writ of error.

Mr. T. Z. Blakeman for plaintiff in error.

Mr. Oscar Foote for defendant in error.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The evidence introduced at the trial, giving it the utmost possible effect in favor of the plaintiff, was insufficient to sup-

port a verdict for him; and the defendant's request, made at the close of the whole evidence, to instruct the jury to return a verdict for the defendant, because Finley, whose negligence was the ground of the action, was a fellow-servant of the plaintiff, should have been granted.

Finley was not a vice-principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow-servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men.

The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one. *Central Railroad* v. *Keegan*, 160 U. S. 259; *Northern Pacific Railroad* v. *Charless*, 162 U. S. 359; *Same* v. *Peterson*, 162 U. S. 346; *Martin* v. *Atchison &c. Railroad*, 166 U. S. 399. See also *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326.

This ground being decisive of the case, no opinion need be expressed upon other questions argued at the bar.

Judgments of the Circuit Court of Appeals and of the District Court reversed, and case remanded to the District Court with directions to set aside the verdict and to order a new trial.

The Chief Justice and Mr. Justice Harlan dissented.